No. 2242

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Plaintiff in Error,

vs.

FRANK STARR,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

Names and Addresses of Counsel.

E. S. PILLSBURY, Esq., Attorney for Defendant and Plaintiff in Error,
San Francisco, California.

H. D. PILLSBURY, Esq., Attorney for Defendant and Plaintiff in Error,
San Francisco, California.

E. C. HUGHES, Esq., Attorney for Defendant and Plaintiff in Error,
661 Colman Building, Seattle, Washington.

MAURICE McMICKEN, Esq., Attorney for Defendant and Plaintiff in Error.
661 Colman Building, Seattle, Washington.

WM. T. DOVELL, Esq., Attorney for Defendant and Plaintiff in Error,
661 Colman Building, Seattle, Washington.

H. J. RAMSEY, Esq., Attorney for Defendant and Plaintiff in Error,
661 Colman Building, Seattle, Washington.

C. A. REYNOLDS, Esq., Attorney for Plaintiff and Defendant in Error,
530 Pioneer Building, Seattle, Washington.

HARRY BALLINGER, Esq., Attorney for Plaintiff and Defendant in Error,
530 Pioneer Building, Seattle, Washington.

CHARLES T. HUTSON, Esq., Attorney for Plaintiff and Defendant in Error,
530 Pioneer Building, Seattle, Washington.

[1*]

In the Superior Court of the State of Washington, in and for the County of King.

No. 2052.

FRANK STARR,
Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,
Defendant.

Complaint.

Plaintiff complaining of defendant alleges:

I.

That at all times herein mentioned defendant was and it still is a corporation duly organized and existing under and by virtue of the laws of the State of California, and doing business and having an office for the transaction of business, and agents upon whom service of Summons may lawfully be made, in Seattle, King County, Washington.

*Page-number appearing at foot of page of original certified Record.

II.

That plaintiff, Frank Starr, on, to wit, September 15, 1911, and for a long time prior thereto, was in the employ of defendant in said city of Seattle, as an installer, and was engaged in stringing wires and cables of the defendant company under the direction of a foreman employed by defendant, and in his said work plaintiff and his fellow-workmen had occasion, from time to time, to use ladders, and that defendant undertook to furnish to plaintiff and his fellow-workmen such ladders and other instrumentalities as were needed by them in their said work.

III.

That on September 15, 1911, the gang, of which plaintiff was a member, under the direction of said foreman, was engaged in putting up a cable on the wall of a building abutting on Post Street, in the city of Seattle, between Pike and Union Streets, in said city; that certain ladders had been furnished for said gang of men by the defendant for their use and plaintiff had nothing to do with the furnishing of said ladders; that said cable was being fastened to said wall **[2]** at a height of approximately 25 or 30 feet above the surface of said Post Street, and said ladders being separately too short to reach to said point, the same, by the direction of said foreman, were spliced together and plaintiff, in the discharge of the duties of his employment, went upon said ladders to fasten said cable; that because of the shortness of said ladders it was necessary for plaintiff to take his position and he did take his position upon the top rung of the uppermost of said

ladders; that the topmost of said ladders was defective in this, that the top rung thereof was cross-grained so that the same was weak and unfit for use, the same being too weak to hold the weight of a man standing upon it; that defendant and said foreman, by a reasonable inspection of said ladder, could have ascertained the condition of said rung, and it would have been apparent upon said inspection that the same was dangerous and unfit for use and would be likely to break if anyone took up a position on said rung, but neither said foreman nor other agent of defendant made such inspection; and that plaintiff did not know said rung was defective, weak or insufficient and was not warned thereof, and supposed that the rung was sufficient for his use in the performance of his work. That when plaintiff in the performance of his duties as aforesaid went upon said ladder and stood upon said rung, as his duties required him to do, the same broke, and plaintiff therefrom fell a distance of about 20 feet to the surface of said Post Street which was paved, and thereby received the injuries hereinafter set forth; that said accident was wholly due to the negligence of defendant in furnishing to plaintiff for use in the performance of his duties, said unsafe ladder and in failing to inspect the same, and in failing to warn him of his danger in using the same, and was not due to any carelessness or negligence on the part of plaintiff.

IV.

That by being so thrown to the surface of said Post Street, plaintiff received the following injuries,

namely: He sustained a fracture of the base of his skull and a fracture of the bone of his right heel; he suffered concussion of the brain and therefrom was unconscious [3] for a period of several hours and thereafter was only semi-conscious for several days; from said injuries to his head he has been rendered almost totally deaf in his left ear; his nervous system received a great and severe shock, and all and singular the said injuries are permanent; that from his said injuries he has suffered great pain and has been confined to a hospital up to this time; that at the time of the said accident plaintiff was a healthy man, of the age of 24 years; that he was constantly employed at wages of approximately $100 per month; that by reason of said injuries he has been unable to work to this day, to his loss in wages in the sum of $50, and he will be unable to work for a long time in the future; that he has necessarily incurred expenses for hospital services on account of said injuries in the sum of $22.50, and for medical services and attention in the treatment of said injuries in the sum of $25.00, and he will be compelled to incur further expense for hospital and doctor's services in the future; that in addition to said special items of damage plaintiff has been damaged by reason of said injuries in the sum of $20,000.

WHEREFORE plaintiff prays judgment against defendant in the sum of $20,097.00, together with the costs and disbursements of this action.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff. [4]

State of Washington,
County of King,—ss.

Frank Starr, being first duly sworn, on oath says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

FRANK STARR.

Subscribed and sworn to before me this 28th day of September, 1911.

H. BALLINGER,
Notary Public in and for the State of Washington, Residing at Seattle.

Copy of within Petition for Removal received and due service of same acknowledged this 10th day of October, 1911.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

Filed Oct. 10, 1911. D. K. Sickels, Clerk.

Filed U. S. Circuit Court, Western District of Washington. Nov. 7, 1911. James C. Drake, Clerk. B. O. Wright, Deputy. [5]

In the Superior Court of the State of Washington in and for King County.

No. 83,409.

FRANK STARR,
Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,
Defendant.

Order of Removal.

This cause coming on duly and regularly for hearing on the regular call of the motion calendar, pursuant to due notice to said plaintiff herein, upon the application of said defendant, The Pacific Telephone and Telegraph Company, for an order transferring this cause to the Circuit Court of the United States for the Western District of Washington, Northern Division; and it appearing to the Court that on the 10th day of October, 1911, the said defendant duly filed and presented to this Court its petition for such removal, in due form of law, and also its bond therefor, duly conditioned, with good and sufficient surety, as provided by law, which bond was on said 10th day of October, 1911, by this Court duly approved, and it appearing to the Court that *this a* proper cause for removal to said Circuit Court;

Now, therefore, it is hereby ordered and adjudged that this cause be and hereby is removed to the Circuit Court of the United States for the Western District of Washington, Northern Division, and the Clerk of this Court is hereby directed to make up and transmit to the said United States Circuit Court a true copy of the record herein.

Dated: October 14, 1911.

MITCHELL GILLIAM,
Judge.

Filed Oct. 14, 1911. D. K. Sickels, Clerk. [6]

Filed U. S. Circuit Court, Western District of Washington, Nov. 7, 1911. James C. Drake, Clerk. B. O. Wright, Deputy. [7]

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant and for answer to the complaint of plaintiff heretofore filed herein admits, alleges and denies as follows:

I.

For answer to paragraph II, this defendant admits that Frank Starr was on the said 15th day of September, 1911, and for a long time prior thereto, in the employ of said defendant in said city of Seattle, but denies each and every other allegation in said paragraph II contained.

II.

For answer to paragraph III, this defendant denies each and every allegation therein contained.

III.

For answer to paragraph IV, this defendant denies each and every allegation therein contained, and especially denies that said plaintiff has been damaged in the sum of Twenty Thousand Dollars ($20,000.00), or any other sum, or at all.

And for another and first affirmative defense, this

defendant alleges:

I.

That any risk or peril attending the work in which the said Frank Starr was engaged at the time of the happening of [8] the accident described in the complaint was open and apparent and well known to the said Frank Starr and assumed by him.

And for another and second affirmative defense this defendant alleges:

I.

That the injuries, if any, received by the said Frank Starr were caused and contributed to by his own careless and negligent acts, and by the careless and negligent acts of his fellow-servants.

Wherefore, this defendant prays that it may go hence with its costs.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Defendant.

State of Washington,
County of King,—ss.

Willis Brindley, being first duly sworn, on oath deposes and says: That he is the commercial manager of The Pacific Telephone and Telegraph Company, the defendant herein; and that he makes this verification on its behalf; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

WILLIS BRINDLEY.

Subscribed and sworn to before me this 7th day of November, A. D. 1911.

[Seal] H. A. OWEN, Jr.,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within answer received and due service of same acknowledged this 7th day of Nov., 1911.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff. **[9]**

[Indorsed]: Answer. Filed U. S. Circuit Court, Western District of Washington. Nov. 7, 1911. James C. Drake, Clerk. B. O. Wright, Deputy. **[10]**

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,
Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,
Defendant.

Reply.

Comes now plaintiff and by way of Reply to the First Affirmative Defense set forth in the Answer of defendant in this cause served, denies each and every, all and singular, the allegations and averments in said first affirmative defense contained.

II.

And by way of Reply to the Second Affirmative Defense in said Answer set forth, plaintiff denies each and every, all and singular, the allegations and averments in said Second Affirmative Defense set forth.

Wherefore plaintiff prays judgment according to the demand of his complaint.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

C. A. Reynolds, being first duly sworn, on oath states: That he is one of the attorneys for the above-named plaintiff; that he has read the foregoing Reply, knows the contents thereof and believes the same to be true; that he makes this verification because plaintiff is absent from King County, Washington.

C. A. REYNOLDS. [11]

Subscribed and sworn to before me this 14th day of November, 1911.

[Seal] H. BALLINGER,
Notary Public in and for the State of Washington,
Residing at Seattle, in said State.

Copy of within Reply received and due service acknowledged this 14th day of Nov., 1911.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant.

[Indorsed]: Reply. Filed U. S. Circuit Court, Western District of Washington, Nov. 21, 1911.

James C. Drake, Clerk. B. O. Wright, Deputy. **[12]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess his damages at Eight Thousand ($8,000.00) Dollars.

F. W. VAN ALLEN,
Foreman.

[Indorsed]: Verdict. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 10, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. **[13]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

Judgment.

BE IT REMEMBERED that this cause came duly on for hearing on the 8th day of October, 1912, plaintiff appeared in person and by Reynolds, Ballinger & Hutson, his attorneys; defendant appeared by Hughes, McMicken, Dovell & Ramsey, its attorneys. Thereupon a jury of twelve good and lawful men of the district was duly impaneled and sworn, and thereafter the evidence of the respective parties was introduced, and after argument of the cause by attorneys on either side the Court duly charged the jury upon the law of the case and the jury retired in charge of a sworn bailiff to consider of its verdict; having duly considered the same said jury, on, to wit, the 10th day of October, 1912, brought into court its verdict, wherein and whereby it did find in favor of the plaintiff and against the defendant, and did assess plaintiff's damages in the sum of Eight Thousand ($8,000) Dollars, and now, upon motion of the

attorneys for plaintiff for judgment upon said verdict, it is hereby

CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that plaintiff do have and recover of and from the defendant said sum of $8,000, together with the costs and disbursements of this action to be taxed; for all of which let execution issue. [14]

Done in open court this 19th day of October, 1912.

CLINTON W. HOWARD,
Judge.

[Indorsed]: Judgment. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 19, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [15]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,
Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,
Defendant.

Memorandum of Costs and Disbursements.

	Amount Claimed.	Amount Allowed.
Clerk of Court—to be taxed.....		$13.90
Attorney's fees $20.00		20.00
Reporters' fees	7.50	7.50
Feeding jury	7.00	7.00
Witness fees:		
R. D. McMillan, Tacoma, Wn.		
1 day, 72 miles.....$6.60		
U. C. Bates, 1 day, 2 miles....	3.10	
A. W. Hawley, 1 day, 2 miles..	3.10	
Total.....12.80		12.80
Total.....61.20		

Taxed Oct. 18, 1912.

FRANK L. CROSBY,
Clerk.

By F. A. Simpkins,
Deputy.

United States of America,
Western District of Washington,—ss.

H. Ballinger, being first duly sworn, deposes and says: That he is one of the attorneys for the above-named plaintiff in the above-entitled cause, and as such has knowledge of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in [16] the said cause, and

that the services charged herein have been actually and necessarily performed as herein stated.

[Seal] H. BALLINGER.

Subscribed and sworn to before me this 15th day of October, 1912.

CHARLES F. HUTSON,
Notary Public in and for the State of Washington,
Residing at Seattle in Said State. **[17]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

PACIFIC TELEPHONE & TELEGRAPH CO., a Corporation,

Defendant.

[Notice of Application for Taxation of Costs, etc.]

To the Pacific Telephone & Telegraph Company, a Corporation, and to Messrs. Hughes, McMicken, Dovell & Ramsey, Its Attorneys:

You will please take notice that on Thursday, the 17th day of October, 1912, at the hour of two o'clock P. M., application will be made to the Clerk of said Court to have the within memorandum of costs and disbursements taxed, pursuant to the rule of said court in such cases made and provided.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

Due service of the within and foregoing memorandum of costs and disbursements and notice of the taxation thereof by the receipt of a true copy thereof hereby is admitted in behalf of parties entitled to such service by the rules of court, this 15th day of October, 1912.

HUGHES, McMICKEN, DOVELL & RAMSEY.

[Endorsed]: Memorandum of Costs and Disbursements. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 15. 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [18]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

Motion to Set Aside Verdict and for New Trial.

Comes now the defendant and moves the Court to set aside the verdict rendered on the 10th day of October, 1912, and to grant a new trial for the following reasons:

I.

Irregularity in the proceedings of the court by

which the losing party was prevented from having a fair trial.

II.

Excessive damages appearing to have been given under the influence of passion or prejudice.

III.

Insufficiency of the evidence to justify the verdict, in this—the evidence is insufficient to establish any negligence on the part of the defendant, the appliance, to wit, the ladder, the defective condition of which it is claimed caused the accident, was not shown by the evidence to have been furnished by the defendant, as is alleged in the complaint, or at all, but upon the contrary was secured by the plaintiff and his fellow-servants; the evidence is insufficient to establish that there was any latent or hidden defect in the said ladder or any defect which the plaintiff by the exercise of ordinary care would not have observed and understood.

IV.

Error in law occurring at the trial in this, to wit: [19]

The Court erred in not holding as a matter of law that the plaintiff was guilty of contributory negligence; the Court erred in not holding as a matter of law that the plaintiff assumed any risk or peril attending the use of the appliance which caused the injury; the Court erred in refusing to grant the motion of defendant for nonsuit, and directed verdict at the close of plaintiff's evidence; the Court erred in refusing to sustain the challenge of defendant to the sufficiency of the evidence and to grant a motion for a

directed verdict at the close of all the evidence.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Defendant.

Copy of within Motion received and due service of same acknowledged this 24th day of October, 1912.

REYNOLDS, BALLINGER & HUTSON.

[Endorsed]: Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington. Oct. 24, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. [20]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, a Corporation,

Defendant.

Order Overruling Petition for New Trial.

This cause came duly on for hearing upon the petition of defendant for a new trial in the above-entitled cause, on the 2d day of December, 1912, the parties appearing by their respective attorneys. After hearing said petition, the Court being duly advised in the premises, it is hereby

CONSIDERED, ORDERED AND ADJUDGED by the Court that said petition be, and the same hereby is, overruled, to which defendant excepts and its exception is allowed.

Done in open court this 13th day of December, 1912.

CLINTON W. HOWARD,
Judge.

[Endorsed]: Order Overruling Petition for New Trial. Filed in the U. S. District Court, Western Dist. of Washington. Dec. 13, 1912. Frank L. Crosby, Clerk. By E. M. L., Deputy. [21]

[Bill of Exceptions.]

In the Circuit Court of the United States, Western District of Washington, Northern Division.

No. ——.

FRANK STARR,
Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY,
Defendant.

BE IT REMEMBERED that heretofore and on, to wit, October the 8th, 1912, the above-entitled cause came regularly on for trial in the above court, and before the Honorable Clinton Howard, Judge of said court, sitting with a jury.

The plaintiff appearing by Harry Ballinger, Esq. (of Messrs. Reynolds, Ballinger and Hutson);

The defendant appearing by W. T. Dovell, Esq. (of Messrs. Hughes, McMicken and Ramsey).

And thereupon the following proceedings were had and done, to wit: [22*—1†]

[Testimony.]

TUESDAY MORNING SESSION.

October 8, 1912, 10 o'clock.

The jury having been first duly empaneled and sworn, at the close of the opening statement by counsel for plaintiff, the plaintiff, to maintain the issues on his part to be maintained, introduced and offered in evidence the following testimony, to wit:

[Testimony of George E. Smith, for Plaintiff.]

GEORGE E. SMITH, having been first duly sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

(By Mr. BALLINGER.)

Q. What is your name? A. George E. Smith.

Q. Where do you reside? A. Portland, Ore.

Q. You were brought here by the defendant in this case, by the telephone company? A. Yes.

Q. What is your occupation? A. Foreman.

Q. Of what? A. Of Cable.

Q. In whose employ?

A. Pacific Telephone and Telegraph Co.

Q. That is the defendant in this case?

A. Yes, sir. [24—3]

Q. Where are you now stationed, in Portland?

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*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number of Testimony as same appears in Certified Transcript of Record.

(Testimony of George E. Smith.)

A. Yes, sir.

Q. How long have you worked for the Telephone Co.? A. About 15 years.

Q. Did you work for them in the city of Seattle?

A. Yes, sir.

Q. During what years?

A. I worked for them in Seattle from 1904, to March, of the present year.

Q. Do you know Frank Starr the plaintiff in the case? A. Yes, sir.

Q. Did he ever work under your supervision?

A. Yes, sir.

Q. During what period?

A. Why, I believe he came to work for me in about January or February, 1907.

Q. Did he work for you then continuously, or for the defendant under your direction, until the time of his accident? A. Very near, he lost some time.

Q. Now, by whom were the ladders supplied for the use of the construction men, whose business was it?

A. The majority of them were supplied by the Telephone Co.

Q. How were they supplied, through whom? Through you or to the men individually?

A. Well, as a general thing, I got the ladders, that is when they were telephone ladders.

Q. Was it always possible to get a sufficient number of ladders from the Telephone Co.? A. No, sir.

Q. In that emergency what were you accustomed to do? [25—4]

(Testimony of George E. Smith.)

A. If I was right around there, I always told them to go borrow them, go get them.

Q. How many men can use a single ladder in the work which you were superintending?

A. Sometimes there is only one man, but when we are out in the street that way, around buildings, there is always two.

Q. It would require at least one ladder then for each two men engaged in the work? A. Yes, sir.

Q. And as I understand you, you were not always able to get so many from the telephone company?

A. Yes, sir.

Q. What kind of work was Frank Starr doing in Sept., 1911?

A. He was putting cable on buildings.

Q. Do you know where Post St. is in this city?

A. Yes, sir.

Q. Where is it?

A. It is between Western Avenue and First Avenue.

Q. And between what intersecting streets, according to your best recollection?

A. It runs from the railroad to Western.

Q. It is a north and south street, isn't it?

A. Yes, sir; it runs the same as the avenue, as First and Second Avenue.

Q. And how wide is Post St.?

A. It is about 40 feet.

Q. Paved or unpaved?

A. Paved, most of the way.

Q. Now, at the time and place of the plaintiff's ac-

(Testimony of George E. Smith.)

cident, which I will call for in a moment, was the street paved? [26—5] A. Yes, sir.

Q. Where was this place of accident located?

A. It was between Pike and Union on Post.

Q. What was the slope of the ground on Post St., at that place?

A. Well, I don't know just what the grade is there.

Q. Is there any slope?

A. Yes, sir, it is quite a steep grade.

Q. Is it lower towards the south of Union St., or higher? A. It is lower towards Union St.

Q. Then the grade is downward from Pike southward? A. Yes, sir.

Q. What was the character of the pavement, as you recall it? A. It is sandstone.

Q. On the 15th day of Sept., 1911, how many men were working in your gang at that place? A. Six.

Q. And how long had they been working in that vicinity, I mean in the immediate vicinity, say within a block? A. The same men?

Q. Yes.

A. Well, some of them had been there for almost a week, and then others had been added.

Q. The personnel of the gang would change from time to time? A. Yes, sir.

Q. I think it is a fact that you had several under your control, did you not? A. Yes, sir.

Q. This particular gang, though, some of them had been there nearly a week? [27—6] A. Yes, sir.

Q. And some had been added within the week?

A. Yes, sir, and some taken away.

(Testimony of George E. Smith.)

Q. But had the gang been kept at about that number, about six? A. Yes, sir.

Q. Was Mr. Starr in that gang? A. Yes, sir.

Q. Do you recall how long he had been on the job in that particular vicinity?

A. Well, I think he had been there four days; I believe that was his fourth day.

Q. Did that gang have any company ladders, or ladders supplied directly by the company?

A. Yes, sir.

Q. How many? A. One.

Q. Do you recall the ladder that is involved in this lawsuit? A. Yes, sir.

Q. There were two pieces of it, were there not?

A. Yes, there were two pieces?

Q. Do you know where the top piece came from?

A. Yes, sir.

Q. Where did it come from?

A. Why, one of the workmen borrowed it.

Q. Which workman? A. Mr. Filer.

Q. How long before the morning of the 15th day of Sept. was it that he borrowed it?

A. Why, I believe he borrowed it a couple of days before, about [28—7] two days before.

Q. In what work was Mr. Filer engaged during the time that elapsed between the time he borrowed the ladder and the time of the accident?

A. He was rewiring and putting up little terminal boxes, going to connect wires to the cable.

Q. How high were they from the ground?

A. About seven feet—seven or eight feet.

(Testimony of George E. Smith.)

Q. How long was this ladder, do you recall?

A. I should judge about six feet.

Q. What was the color of it and its appearance?

A. It is weather-beaten.

Q. Was it rough or smooth?

A. Why, I believe the sides were kind of dressed. I think the sides were dressed, and the boards, the cross-pieces were rough.

Q. That is the rounds? A. Yes, sir.

Q. What is your best recollection as to the material of which the rounds were made?

A. Do you mean all of the rounds?

Q. Well, of that upper piece of ladder, were they fir or hard wood?

A. It was fir, the whole ladder was fir.

Q. In your business, you have had occasion for many years to use ladders? A. Yes, sir.

Q. I will ask you to state whether or not cross-grained sticks are usually used for rounds of ladders.

A. No, sir, they are not. [29—8]

Q. Would you say that their use is very seldom?

A. Yes, sir.

Q. There was another short ladder in use there before the accident, was there not? A. Yes, sir.

Q. What was that like?

A. Why, that was about 12 feet, I should judge.

Q. And do you know who borrowed that?

A. McCartney.

Q. He was another of the men on the work?

A. Yes, sir.

Q. Now, I will ask you to state whether or not you

(Testimony of George E. Smith.)

made any application to the defendant for some ladders for that work recently before the accident.

A. I did.

Q. When was the last application you made?

A. The day before it happened.

Q. With what result?

A. I was unable to get them.

Q. Now, were you at the place of the accident substantially every day? A. Yes, sir.

Q. Or more than once? A. Yes, sir.

Q. Did you see these two ladders in use during the time that they were on the job, and before the accident? A. Yes, sir.

Q. What, if any, conversation did you have with the men of that gang about ladders the day before the accident? A. Well, they wanted me— [30—9]

Mr. DOVELL.—I object to that as not material, unless it is connected with the plaintiff here, probably what he told the plaintiff would be material.

By the COURT.—Objection sustained, exception allowed.

Q. In the presence of the plaintiff, in the presence of Mr. Starr?

A. I don't quite get what you mean.

Q. State whether or not the day before the accident you had a conversation with the men in the gang in the presence of Mr. Starr, concerning ladders?

A. Yes, sir.

Q. What time in the day was that?

A. Why, if I remember correctly, it was right after lunchtime, possibly between two and three.

(Testimony of George E. Smith.)

Q. What was that conversation?

A. They wanted a longer ladder to get up there, to get up to where the cable was. It was possibly about 20 or 25 feet from the ground, and we only had one ladder that would reach up there.

Q. That was the long ladder you have already mentioned?

A. Yes, sir. So I told them to splice them two ladders together and use them. I don't know as I said two ladders. I said, "Splice them ladders together and use them."

Q. There was just these other two short ladders on the ground besides this long ladder? A. Yes, sir.

Q. Now, did you observe that there was any cross-grained round in the shorter of these two ladders?

A. No, sir.

Q. Was the fact that it was cross-grained apparent to just an [31—10] ordinary observation, such as one gives to a ladder in using it?

A. I didn't quite understand how you got that.

Q. You saw the ladders in use and saw them on the ground? A. Yes, sir.

Q. Was this cross-grained condition apparent to you, was it apparent to you? A. No, sir.

Q. Would it be apparent to an ordinary look, if one would look at the ladder, would it be apparent to him, I mean without a special inspection of the round? A. No, I don't think it would.

Q. Did you make any inspection of either of these ladders? A. No, sir.

Q. Was there anyone else in direct charge of these

(Testimony of George E. Smith.)

men or of the appliances that they were using besides yourself? A. No, sir.

Q. What was the condition of Mr. Starr's health—what was his physical condition before the 15th day of Sept., 1911?

A. Well, he never lost any time, never was sick that I know of.

Q. Did he appear to be a healthy man?

A. Yes, sir.

Q. Strong? A. Yes, sir.

Q. Was he a good worker?

A. I considered him such.

Q. What wages was he being paid?

A. $3.75 a day. [32—11]

Q. What was the nature of the work the men were doing at the time of the accident and prior thereto—you spoke of stringing cables. Just describe that.

A. Do you mean was it heavy or light work?

Q. What were they doing, what is a cable?

A. Well, a cable, this particular cable we were stringing had a one hundred and one paid of wires in it—that is, very often copper wire insulated with paper, around them is wrapped some paper, a lead sheet, which will go possibly about three-quarters of a pound to a foot.

Q. Now, on the end of this particular cable, was there any sleeve or anything of that sort?

A. No, sir, we were splicing to put on what we call a sleeve; there was to be a splice.

Q. There was a splicing on it?

A. There was to be one put on.

(Testimony of George E. Smith.)

Q. Do you recall that there was not a rather larger sleeve, about one foot long on the end of it, a soldered end? A. I couldn't say about that.

Q. Such ends were used on cable, were they not?

A. Sometimes they are on there.

Q. What would such an end weigh—it would weigh a little more, would it not?

A. Yes, a little more, but when the copper wire would be out, it would be just about the same.

Q. Now, you say they were stringing cable on Post St. On which side of the street were they stringing it? A. On the east side.

Q. To what supports were they stringing it?

A. Well, we had to drill holes in the brick and then put in [33—12] a lead sheet, and put a clamp on to that.

Q. I gather, then, it was being supported by the walls of the building abutting on the street?

A. Yes, sir.

Q. How far apart were these supports placed?

A. 18 inches.

Q. Now, in putting them up, did you have any more than the permanent installation, or was it just put up temporarily? A. Put up temporarily first.

Q. In what manner was that being done?

A. We would drive a nail in the mortaring of the brick, and then put a piece of wire through the cable so it would slide through as we worked our slack through, slide through this kind of running loop.

Q. It would be supported in that way until another gang, or the same gang subsequently, would come

(Testimony of George E. Smith.)

along, and clamp it permanently into the building?

A. Yes, sir.

Q. It was just temporary work was being done at that time, wasn't it?

A. No, Mr. Starr was doing the temporary work, and the other two were coming along, following up, doing the permanent work.

Q. Was this being strung from the north or from the south? A. From the north.

Q. I understood you to say that Post St., at that place sloped toward the south, so that toward the south was lower than toward the north?

A. Yes, sir.

Q. Was the cable being kept at about a horizontal position [34—13] or did it follow the slope of the street? A. No, sir; kept level.

Q. Then, I understand you that the cable, as it was being installed further on, further south, would be higher and higher above the level of Post St.?

A. Yes, sir.

Q. And at this particular place it was perhaps 25 feet above Post St.? A. Yes, sir.

Q. You were not present at the moment of the accident, I think? A. No, sir.

Q. How long afterwards did you see Mr. Starr?

A. About twenty or twenty-five minutes.

Q. Where was he then?

A. He was in the hospital.

Q. What appeared to be his condition as to being conscious or unconscious?

A. Well, he could—he felt dazed, and just kind of

(Testimony of George E. Smith.)
said a word and then he would go to sleep like, so I didn't say very much to him. I thought I had better let him rest.

Cross-examination.

(By Mr. DOVELL.)

Q. How many ladders, or pieces of ladders, how many parts of ladders were there on this job altogether? A. There were five.

Q. Five pieces of ladder? A. Yes, sir.

Q. How many men were working on the job? [35—14] A. There were six.

Q. How much territory did it cover?

A. One block.

Q. You had general charge of that?

A. Yes, sir.

Q. Did you have any other work under your supervision at that time? A. Yes, sir.

Q. Where?

A. Why, I had some work going on in the Hoge Building, and I had it, you might say, all over the city, that is, different places. I don't remember just where the men were working that day.

Q. How many men did you have under you that day, how many men altogether? A. Why—

Q. About how many? A. Between 20 and 25.

Q. Now, those men were scattered, as I understand, all over the city? A. Yes, sir.

Q. You, of course, didn't spend any great length of time at any one place?

A. Why, it depended on the class of work the men were doing.

(Testimony of George E. Smith.)

Q. How much time did you spend at this job on Post St.?

A. Well, along there. I used to go along there possibly four or five times a day.

Q. Just passed by there and observed the work and gave what directions you thought necessary and go on to some other place? [36—15] A. Yes, sir.

Q. You didn't linger there and take a hand in the work? That is what I am getting at.

A. Like in putting the cable up, whenever they were stringing a cable I was always right there.

Q. They had five pieces of ladder. Where did they get all those five pieces?

A. Well, two pieces belonged to the telephone company, that was, could be made into two pieces, or one ladder.

Q. An extension ladder of two pieces?

A. Yes, sir.

And two pieces were borrowed and one was made up out of some two-by-four's and some boards.

Q. Now, somebody told you they needed a ladder to get up about 18 to 20 feet from the ground, it was necessary to get that high, was it? A. Yes, sir.

Q. Somebody told you they needed a ladder. Do I understand you correctly? A. Yes, sir.

Q. And they told you they had none of sufficient length; is that correct? A. Yes, sir.

Q. Now, then, you told them to splice some of their short ones together; is that right?

A. I didn't say "nail them," I said, "Splice your ladders together."

(Testimony of George E. Smith.)

Q. Now, did you point out the particular ladders they were to splice together, or did you just say, "Splice two of your short ones together"? [37—16]

A. Well, there were only just the two short ones that were there, that they did splice together.

Q. Did you examine them, did you pick out these two short pieces, or did you just say, "Splice two short ones together"?

A. Well, I didn't pick them out for them.

Q. Did you examine either of them? A. No.

Q. Who were those men that you told to splice two short ladders together?

A. McCartney and Starr.

Q. Told McCartney and Starr to splice two short ladders together? A. Yes, sir.

Q. Then you went off and left them, did you?

A. That was along in the afternoon. I was back again before quitting time at night.

Q. In the meantime Starr had been hurt?

A. No, sir, he wasn't hurt until the next morning.

Q. He used the ladder then that afternoon?

A. Yes, sir.

Q. After he had spliced it? A. Yes, sir.

Q. Starr used it, did he?

A. Starr wasn't on it when I came there, when I came round.

Q. Who was?

A. I think McMellon was on it when I came round.

Q. Did you ever see Starr on it at all?

A. No, sir.

Q. Did you see Starr splicing it? [38—17]

(Testimony of George E. Smith.)

A. Yes, sir.

Q. You saw him start to splice it before you left?

A. Yes, sir.

Redirect Examination.

(By Mr. BALLINGER.)

Q. I understand you that two of the pieces of ladder that you referred to were the two pieces of the company ladder? A. Yes, sir.

Q. That was an extension ladder?

A. Yes, sir.

Q. And was in pieces, that is, they could be separated? A. Yes, sir.

Q. Now, were they being used as one ladder on that job? A. On that job; yes, sir.

Q. Would either piece of it, separately, be sufficient to do the work of the height that that cable was being put up? A. No, sir.

Q. Now, two of the other pieces were the ones you have already testified to, as having been borrowed by McCartney and Filer? A. Yes, sir.

Q. What was this other one?

A. The other one was the one Filer was using.

Q. He was using that? A. Yes, sir.

Q. When these other people spoke about wanting another ladder, you referred to what ones when you told them?

A. Why, the ones that they spliced together.

[39—18]

Q. Those were the ones you referred to?

A. Yes, sir.

Q. Told them to splice them together and go up

(Testimony of Thos. McCartney.)

on them? A. Yes.

Witness excused. **[40—19]**

[Testimony of Thos. McCartney, for Plaintiff.]

THOS. McCARTNEY, having been first duly sworn, testified as follows on behalf of the *defendant:*

Direct Examination.

(By Mr. BALLINGER.)

Q. What is your name? A. Thos. McCartney.

Q. Where do you reside? A. In Seattle.

Q. How long have you lived in Seattle?

A. About four years.

Q. And what is your occupation?

A. Journeyman lineman.

Q. For whom are you working now?

A. With the Seattle Electric Co.

Q. The Seattle Electric Co.? A. Yes, sir.

Q. Have you ever worked for the defendant, The Pacific Telephone and Telegraph Co.?

A. Yes, sir.

Q. When did you work for them?

A. I started out about 1910, or the last part of 1909, and worked until the present year, the present first of this year.

Q. Worked until the first of 1912?

A. Yes, sir.

Q. Who was your foreman?

A. Mr. Smith was my foreman.

Q. The gentleman who has just left the stand?

[41—20] A. Yes, sir.

(Testimony of Thos. McCartney.)

Q. Your work was in connection with the installation of cables and wires? A. Yes, sir.

Q. Did you know Mr. Starr during that period?

A. Yes, sir. Part of the time. Not all of the time. Maybe two and a half years.

Q. What was his business?

A. He was a journeyman lineman.

Q. Was he working in your gang during any portion of that time? A. Yes, sir.

Q. Was he so working on the 15th day of Sept., 1911? A. Yes, sir.

Q. Were you working at the same place he was?

A. Yes, sir.

Q. Where was that place?

A. Place on Post St., between Union and Pike,—between Western Avenue and First Avenue.

Q. In what direction, what general direction, does Post Street run, northerly and southerly, or easterly and westerly? A. It runs north and south.

Q. Where were you stringing cable at that time?

A. On Post St., at the corner from Pike south.

Q. What was the slope of the ground going in a southerly direction, was the ground higher or lower?

A. Well, it was lower. I can't exactly describe the—

Q. Was the cable being strung on a level or did it follow— A. Strung on a level.

Q. How long had the gang of which you and Mr. Starr were members **[42—21]** been working at that place, or in that vicinity?

A. I had been there about two or three days. I

(Testimony of Thos. McCartney.)

couldn't tell exactly. But just about two or three days I had been working there.

Q. You remember where Starr was working the day or two before the accident, whether he was using ladders or not? A. No, sir.

Q. He wasn't? A. No, sir.

Q. How was he working?

A. He was working on a bolstering chair swung from the top of the building, pulley block, rope and pulley block.

Q. He was supported then from above and didn't use the ladder?

A. Not using any ladder; no, sir.

Q. How many men were working on that job other than the foreman? A. Six.

Q. Can you name them?

A. There was Mr. Filer and Mr. McMellon and Mr. Dalton, Mr. Starr and myself and Mr. Gould.

Q. Mr. Werner?

A. Mr. Werner,—Mr. Gould had left—Mr. Werner was in his place. Excuse me.

Q. How many ladders were in use in that place?

A. One. And there was one extension ladder and two short ladders.

Q. By whom was the extension ladder furnished?

A. By the company.

Q. What was the understanding as to who should provide ladders [43—22] whether the company or the men, whose business was it to provide the ladders? A. It was the company's.

Q. Now, did they always provide a sufficient num-

(Testimony of Thos. McCartney.)

ber of ladders for the use of the men?

A. Not on our jobs.

Q. Through whom were they furnished—could the men go and get them or would the foreman have to go after them?

A. The foreman would have to get an order for them if there was any gotten.

Q. Now, when, as you say, the company failed to supply a sufficient number of ladders, how were they procured?

A. Well, they used to have to rustle around the alleys and get them.

Q. By whose orders would they do that?

A. By the foreman, if he was there, and if he wasn't there, we would take that on our own responsibility, because we had to have them—

Q. For a gang of six men how many ladders would be required, if they were working above ground?

A. Three would be required.

Q. And how would a ladder be used by the two men?

A. Well, one man would wait on the other man on the ground, while the other man was working up on the ladder.

Q. One man would work on the ladder and the other stand at the foot of the ladder?

A. The one man could wait on two men working on ladders.

Q. In that case three men could use two ladders?

A. Yes, sir.

Q. Now, in the period just before the 15th day of

(Testimony of Thos. McCartney.)

Sept., 1911, [44—23] while this job was going on in this vicinity, how many company ladders had been supplied? A. One.

Q. Now, were there any other ladders used in the work at that place and time? A. Yes, sir.

Q. How many others?

A. There was one short ladder been used. I wanted a ladder to do some work and I borrowed another ladder, that made two, in preference to the extention ladder.

Q. Who borrowed the short ladder?

A. I am not sure, but I think Mr. Filer.

Q. Was it borrowed before yours or afterwards?

A. How is that?

Q. Did he borrow it, or whoever borrowed it, did he borrow it before you borrowed yours or afterwards?

A. Yes, sir, he borrowed it before I did.

Q. How long had the ladder you borrowed been on the work before Mr. Starr was hurt?

A. I am not sure, but I think a day—had been on there about a day.

Q. All of the preceding day?

A. I am not sure of that, whether it was on more than that one day or not, but I think it was just about one day.

Q. Now, the other ladder, did anybody use it?

A. The small ladder?

Q. Yes. A. Mr. Filer.

Q. What was Mr. Filer doing with it?

A. Putting up terminal boxes on the cables, where

(Testimony of Thos. McCartney.)

the cable [45–24] terminates into the boxes.

Q. About how high from the ground?

A. About 7 feet.

Q. Now, did Mr. Starr use either of those ladders before the day he got hurt?

A. I am not sure of that.

Q. You didn't see him using it?

A. Not that I know of I didn't see him.

Q. He was sitting in this bolstering chair a good part of the time? A. Yes, sir.

Q. How long had you been working about work that required the use of ladders?

A. About,—well,—we were requiring the use—I think we required ladders when we started on the job.

Q. I didn't make myself clear. How long have you worked at work where you had to use ladders—How long have you done that in your lifetime?

A. I have been using ladders for two years—about two and a half years.

Q. Is it customary to make ladders with a round that is cross-grained? A. No, sir, it isn't.

Q. Is such a ladder safe? A. No, sir.

Q. What would you say as to whether the use of cross-grained rounds is rare or not, does it happen once in many times? A. It is rare.

Q. What was the color, or the general appearance of this short ladder, was it painted or unpainted, or weather-beaten [46–25] or what?

A. It was rather of a wood color, dark color, that would naturally have been out in the rain—it would

(Testimony of Thos. McCartney.)
look dark—it was the natural color of the wood that is rough.

Q. Did you observe the rounds of this small ladder, about how large they were?

A. Well, not exactly. I just took a glance at them.

Q. About how large were they?

A. They were about two inches, two and a half inches in width. They were three quarters of an inch thick.

Q. How were they fastened to the legs of the ladder? A. They were nailed on the outside.

Q. They were not notched in, or morticed in any manner?

A. No, sir, not on the top piece. On the bottom piece they were.

Q. I mean on this small ladder?

A. The small ladder they wasn't.

Q. You saw this ladder as it was used about there from time to time? A. Yes, sir.

Q. Did you observe any cross-grained rounds in the ladder before the accident? A. No, sir.

Q. If there was any cross-grained piece there, was it so apparent that a man in the ordinary use of the ladder would see it? A. Not that I noticed.

Q. Would such a cross-grained piece be safe to go upon? A. No, sir. [47–26]

Q. Now, the piece you borrowed was about how long? A. About 12 or 14 feet.

Q. How was it constructed?

A. It was made of dressed two-by-fours, and the

(Testimony of Thos. McCartney.)

rungs were morticed into the ladder, that is, notched into the ladder so that it left them straight. When you would put the ladder up against the building, the rung would be straight up and down.

Mr. DOVELL.—What would be straight up and down?

A. The cleat would be straight up and down. They were notched in so when the ladder would be set up against the building they would be straight up and down, notched in about a half inch or so on the bottom side, so that they made a little seat there for the rung to sit on, notched right in so that they set right into the two by fours.

Q. Did you see the foreman at that place on the 14th day of Sept., 1911? A. Yes, sir.

Q. Was anything said at that time about ladders in Mr. Starr's hearing to the foreman?

A. Yes, sir.

Q. And by the foreman? A. Yes, sir.

Q. What was said?

A. We asked for some ladders to do the work. There were four of us there, hadn't only the one ladder to work on.

Q. What did Mr. Smith say?

A. He came along on the work and he says, "We want some more ladders. This ain't long enough, and this ain't enough ladders for us to work." "Well," he says, "You will have [48—27] to rusale some."

Q. That was the day before?

A. That was the day before.

(Testimony of Thos. McCartney.)

Q. Did he say anything about splicing?

A. Not the day before he didn't. The ladders was there—yes, it was the day before he said, and when we asked him, he asked us if we had ladders and we says, "No, we ain't got ladders, nothing to do the work." "Well," he says, "you will have to rustle."

Q. That was the day before, the day before the accident?

A. Yes, sir, and when he said that he said, "Splice these ladders together."

Q. When was it you had a talk with him about the splicing? A. That day, the day before.

Q. The day before what?

A. The day before the accident.

Q. What time of day was it?

A. Well, it was along about lunch time or noon, something of that kind.

Q. He told you—what did he tell you then?

A. He told us to splice the ladders together, the short ladders we had to do the work.

Q. What ladders did he refer to?

A. There wasn't only the two short ladders on the job. A. And they were at hand when he—

A. They were leaning up against the building.

Whereupon Court adjourned until Tuesday afternoon, October the 8th, 1912, 2 o'clock. [49–28]

(Testimony of Thos. McCartney.)

TUESDAY AFTERNOON SESSION.

October 8, 1912, 2 o'clock.

THOS. McCARTNEY on the stand.

Direct Examination (Continued).

(By Mr. BALLINGER.)

Q. Before recess was taken this morning you stated that on the afternoon before the morning of the 15th of Sept., 1911, the foreman was at the place of work, and in response to a request for ladders, he said to splice together the ladders you had, and there were just these two pieces which could be spliced together?

A. Yes, sir.

Q. Did you splice them? A. Yes, sir.

Q. How were they spliced, what position?

A. They were together on the sides like that (indicating).

Q. That is legs?

A. The legs were lapped about 12 or 14, maybe 16 inches, and nailed then to the other, top of the bottom piece of the ladder and then put around, 14 iron wire put around the rung to hold the ladder from giving down, so that if the notches happened to break, that the wire would hold it.

Q. Now, which piece of ladder was put on top?

A. The small piece.

Q. That is to say, the Filer ladder was put on top of what [50—29] we might call the McCartney ladder? A. Yes, sir.

Q. And nailed and lashed in place? A. Yes, sir.

Q. Who did the nailing and lashing?

(Testimony of Thos. McCartney.)

A. We both done the nailing and lashing, both Mr. Starr and I.

Q. Who did the principal part of it?

A. I don't know who done the principal part. I know I done some of it and he done some of it; we were working together.

Q. Did that splicing give way any other time after that? A. No, sir.

Q. Where were you on the morning of the 15th of Sept., 1911? A. Working right there on the job.

Q. Where was Frank Starr, the plaintiff?

A. Working with me, close to me.

Q. And who else were working on the job that morning?

A. Mr. Werner and Mr. McMellon and Mr. Dalton, Mr. Starr and myself, and I think Mr. Gould—I ain't positive, but I think Mr. Gould.

Q. Now, did an accident happen to the plaintiff, Frank Starr, on that morning? A. Yes, sir.

Q. About what time in the morning did that accident happen?

A. About half-past nine, I should think.

Q. What was the hour of going to work?

A. Eight o'clock.

Q. Did you see Frank Starr just before the accident happened, [51—30] just before it happened?

Q. Just before it happened, no, sir, I wasn't looking or noticing particularly.

Q. Where were you when the accident happened?

A. On the ladder about 12 or 15 feet north of him,

(Testimony of Thos. McCartney.)

on the same building, working on there with him.

Q. What was Mr. Starr engaged in doing at the time of the accident?

A. He was about to pull up the cable, and I could see the position he was in, they was to put up the cable on the end, up over a nail which he drove in the wall.

Q. Was the cable already supported at a place near him?

A. About 13 feet it was, the support from him.

Q. You mean that was the length of the loose end?

A. That was, the first support from where he was.

Q. About 13 feet? A. Yes, sir.

Q. Now, did this cable have a sleeve on the end of it? A. Yes, sir.

Q. What was the nature of the sleeve?

A. It was about one foot long, nearly that, and then it had been a splice, where they had spliced the cable together,—it was an old cable that had been used before, and in taking it down they sawed it in two, and then sealed the end by putting solder, pouring on solder, heating it and pouring it on, and filled the end with lead, to keep the air and moisture out of it.

Q. Would that process increase the weight of that end? A. Yes, sir.

Q. Where was this spliced ladder that you have testified to? [52—31]

A. It was standing up to the side of the building, at this point where this loose end was. He was trying to hang up—

Q. Was Starr using this ladder? A. Yes, sir.

Q. When he got up there, just before the accident,

(Testimony of Thos. McCartney.)

what was he doing?

A. He was trying to straighten it out and get it in place so we could cleat it. I was cleating on about 12 or 15 feet from the other side of him and was going along putting it on permanently. He was taking the slack out of it and trying to get it up there in place, so he could go to cleating the upright piece.

Q. In attempting to hand up that cable, just what position was he in, where was his right hand?

A. His right hand was up onto the cable in this manner, and he had a wire.

Q. We can't get that in the record without putting it in words. His right hand was up by the side of his head?

A. Holding the cable, he had, his right hand had a wire, in the other hand pulling it over a nail.

Q. Where was this wire fastened he was pulling over the nail with his left hand?

A. It was under the end of this splice—it was like a knob on the cable, just soldered on; the wire was underneath the splice so it wouldn't slip off.

Q. He was pulling up with his left hand and had his right hand under the end of the cable, lifting it up? A. Yes, sir.

Q. Now, did he have either hand free to take hold, to press [53—32] against the building, or take hold of the ladder or anything of that kind?

A. No, he had both hands occupied with the cable and wire.

Q. State whether or not the attitude which he assumed was the necessary attitude in doing work of

(Testimony of Thos. McCartney.)

that kind. A. Yes, sir.

Q. Was his body above or below the top of the ladder—that is to say, was the ladder in front of him or below him?

A. The ladder was partly in front of his leg.

Q. And how high up would the top of the ladder reach?

A. It wouldn't reach very high—about his knees, probably.

Q. About to his knees? A. Yes, sir.

Q. Was the ladder setting plumb against the wall, or was the bottom out?

A. It was out from the wall pretty much.

Q. And he was on the upper part of the ladder, so that the top of the ladder would be about to the level of his knees? A. Yes, sir.

Q. In that attitude? A. Yes, sir.

Q. Just describe the accident as it happened there at that time.

A. I heard the noise, the snap, and I turned my head around—I was standing on the ladder—I just turned the other way around, and I turned my head like that, to look over there, and when I did I saw him coming down in the air.

Q. In what position was he as he came down?

A. He was coming, when he started first, he was kind of on his feet downward, and gradually he turned over, backwards, [**54—33**] and kept on going backwards, and when he struck the ground he struck on his right foot, the whole—with his foot up in the air.

(Testimony of Thos. McCartney.)

Q. Which foot was up in the air?

A. The left was kind of crumpled down—his left foot was kind of crumpled under and he struck on his right like that (indicating), on his heel, and that kind of broke his fall, and then he went on over backwards and struck with his head.

Q. Where did he strike with his head?

A. Struck somewhere on the back of his head, back or side, somewhere near that.

Q. As he fell, did he fall to the right of the ladder, looking towards the east or to the left?

A. He fell towards the right of the ladder, looking towards the east.

Q. Now, did you observe which rung it was that broke?

A. Not exactly; no. I was excited and I didn't make a careful examination of it.

Q. What is your best impression about it?

A. I think it was the first or second. I don't know for sure.

Q. The top or one next to it?

A. Yes, the first or second.

Q. Where did it break, the north end of it or south end? A. The south end of it.

Q. In what direction did it break—did it break square off or slanting?

A. It would be slanting, nearly that. I didn't get a good view of it because I was excited, like everybody is, but it looked to me like, at a glance, that it was broke slanting [55—34] ways like, across the

(Testimony of Thos. McCartney.)

rung, although it broke right off catering, and also slanting.

Q. Let's see if I get your meaning, that it slanted from the top downward to the right.

A. From the rung from where his feet was, down to the side piece.

Q. To the lower part?

A. To the side piece, practically slantways on the inside, slantways of the piece.

Q. The edges of the break, were they horizontal right across, or did it, as it were, dip?

A. One side of it was longer, a little bit longer than the other, kind of slantways through the wood.

Q. When you reached the bottom, did you go down the ladder at once to where he was?

A. I did; yes, sir.

Q. What appeared to be his condition as to being *conscious unconscious?*

A. He was unconscious.

Q. What was done with him?

A. He was carried into a building there—I don't know what the name of it is—but they carried him in there, until they could get physicians and an ambulance to take him away.

Q. Was he taken to the hospital? A. Yes, sir.

Q. To what hospital was he taken?

A. City Hospital.

Q. Did you visit him after that? A. I did.

[56—35]

Q. When?

A. I went with him from the accident, went with

(Testimony of Thos. McCartney.)
him in the ambulance to the hospital.

Q. Did his condition remain the same or did it change on the way?

A. Well, he came—he came to, but not so he would know me, or know who I was or anything like that. He didn't seem to realize anybody. He was, of course, so he could speak, but he wouldn't seem to realize.

Q. Was his speech regular and sensible or incoherent? A. It was not.

Mr. DOVELL.—Q. It was not what?

Q. Was insensible?

A. No, he was going down—he came to before they got down there in the ambulance, going, he came to at the building in the ambulance going down. I was holding his shoulder and he says to me, "Let me out of here. I am all right, I am all right—let me out of here." I said, "No, you are hurt, Frank." That is what I said to him, and he said, "Oh, no, I ain't hurt," and I says, "You better lay right here and keep quiet."

Q. Had you known Mr. Starr long before the time of this accident?

A. I had known him for about two and a half years.

Q. What appeared to be the state of his health prior to that time? A. Healthy and strong.

Q. Did you ever know him to be sick or ailing in any way? A. No, sir.

Q. What was his complexion? [57—36]

A. It was healthy, red complexion.

(Testimony of Thos. McCartney.)

Q. Did you observe whether his temperament was a happy one, or a moody one, before he was hurt?

A. I don't understand you.

Q. What kind of a man was he in regard to being pleasant and healthy, or sad?

A. He was a pleasant, good-natured man. Very good natured; always pleasant, whenever he met you. He always had a smile—was always very nice to everybody he met.

Q. Have you seen him very frequently since this accident? A. I have, frequently.

Q. And up to the present time?

A. Up to the present time.

Q. What, if any, changes have you noticed in his appearance, or his expression, or his complexion generally, what changes, if any, did you notice since the accident?

A. His changes, he seemed as if he acts like he is lost or dreaming, and he has a whole lot on his mind. He sits—

Q. Do you notice any peculiar expression on his face?

A. He sits at times, don't appear to hear anybody or see anybody, just simply sits there with his head down and he don't act like the same man. I wouldn't know he was the same man.

Q. What change, if any, have you noticed in his complexion?

A. He is pale at times, doesn't seem in good health.

Q. Have you noticed any change in his disposition, that is, whether he is less happy in dispositon?

(Testimony of Thos. McCartney.)

A. I have noticed that he isn't happy.

Q. Have you noticed any particular expression on his face that you didn't see before the injury? [58—37]

A. I do, but I can't explain that. I can't explain the expression, but I have seen the change in the expression on his face.

Q. Is the expression that he now bears such as you have observed since the accident?

A. Something like that, yes, sir. I say, at different times it shows there more than at others.

Cross-examination.

(By Mr. DOVELL.)

Q. This ladder upon which Starr was standing at the time the accident occurred was made up of two short ladders, one, I understand, about 12 feet and the other about 6 feet? A. Yes, sir.

Q. The shorter one, or the six foot ladder, spliced on top of the other one? A. Yes, sir.

Q. Now, what character of a ladder was this top one?

A. It was very rough material, not finished material.

Q. Was it a frail ladder?

A. It was a frail appearing—

Q. What were the sides of it made of?

A. I think it was made of oak; I ain't sure.

Q. What size, what dimension?

A. I should think they were two and a half inches, two or two and a half by three-quarters of an inch.

Q. About two and a half by three-quarters?

(Testimony of Thos. McCartney.)

A. Yes, that is in thickness.

Q. About three-quarters. The sides of the ladder were about [59—38] three-quarters of an inch thick? A. Yes, sir.

Q. And about two and a half inches broad?

A. Yes, and the rungs were made of something similar to the same stuff.

Q. About the same size? A. Yes, sir.

Q. Set in with a sort of a half mortice?

A. No, sir, they were nailed on the outside of the ladder.

Q. The rungs were nailed on the outside?

A. Outside of this three-quarters of an inch.

Q. Were they laid into the side pieces at all?

A. No, they weren't.

Q. Just nailed on the outside?

A. Just nailed on the outside.

Q. How many notches on each end, do you know?

A. I think there was one or two. I didn't examine them closely.

Q. It is your impression they were made of oak?

A. White; yes.

Q. Where did these two ladders, two pieces of ladder which made up this one ladder, come from?

A. I borrowed one from John Davis—I think it is John Davis, the paint-shop; they have a shop down there where they have paints.

Q. Where?

A. It is just a half a block below where we were working.

Q. You borrowed it. Did you go and ask them to

(Testimony of Thos. McCartney.)

give it to you?

A. Yes, sir, I went there and asked the gentleman if I could take his ladder. [60—39]

Q. That was the lower half?

A. That was the lower half; yes, sir.

Q. Where did the upper part come from?

A. It was on the job, by some of the boys getting it.

Q. You don't know who got it?

A. No, I don't really know.

Q. Did the company supply either one of those?

A. No, sir.

Q. You boys who were there on the work went and got those ladders? A. Yes, sir.

Witness excused. [61—40]

[Testimony of R. D. McMellon, for Plaintiff.]

R. D. McMELLON, having been first duly sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

(By Mr. BALLINGER.)

Q. What is your name? A. R. D. McMellon.

Q. What is your business or occupation?

A. I am an electrician.

Q. Have you ever worked for the Pacific Telephone and Telegraph Co.? A. Yes, sir.

Q. During what period did you work for them?

A. I think I went to work for them on June the 5th, 1908, if I am not mistaken, and worked from then until some date in March, I am not sure what the date was.

(Testimony of R. D. McMellon.)

Q. Of what year? A. Of this year.

Q. In what capacity did you work for them?

A. I was classed as an installer in the cable department.

Q. Did you work at any time in the same gang with Frank Starr? A. Yes, sir.

Q. During what period did you work with him?

A. Well, I worked off and on with him, I think about three years of that period.

Q. Who was the foreman in charge?

A. Mr. George Smith.

Q. Who undertook to furnish the ladders that were used by the men employed by the company? [62—41]

A. The company was supposed to furnish them

Q. Through whom did they furnish them?

A. Through the foreman.

Q. Did they always supply a sufficient number?

A. They never did until after Mr. Starr's accident.

Q. They didn't at any time prior to the accident?

A. No.

Q. From time to time they didn't supply enough?

A. Never that I knew of.

Q. Now, when a job required a larger number of ladders than the company supplied, what, if any, directions were given by the foreman?

A. The foreman directed us to borrow ladders wherever we could get them, as a rule.

Q. And could you get them then?

A. Sometimes we could, if we couldn't borrow

(Testimony of R. D. McMellon.)
them we stole them—got them the best way we could, usually.

Q. Were you working in the gang with Frank Starr at the time he got hurt?

A. Yes, sir; I was working about 50 feet from him at the time he was hurt.

Q. What ladders were on the job at that time?

A. There was one company ladder and, I believe, either four or five borrowed ladders.

Q. How about the spliced ladder from which he fell—are you familiar with that ladder?

A. I saw the ladder.

Q. Do you know who borrowed the upper portion of that ladder?

A. I can't swear who borrowed it, but I think Mr. Filer borrowed it; I am not sure. **[63–42]**

Q. Do you know who used that for a day or two before the accident?

A. I think that Mr. Filer used it. I couldn't swear that he used it.

Q. The other portion, who borrowed it, if you know? A. Mr. McCartney, as near as I know.

Q. Do you recall the foreman being on the job at that place a couple of days before the accident?

A. He had been there every day, I believe, for a week.

Q. Do you remember whether anything was said to him about the shortage of ladders?

A. I understood there was; I didn't say nothing to him personally, myself, but I understood there was—

(Testimony of R. D. McMellon.)

Mr. DOVELL.—Never mind.

Q. Anything that others told you wouldn't be admissible.

A. I didn't do any of the complaining about it to him.

Q. Now, at the time the Filer ladder was borrowed and at the time the McCartney ladder was borrowed, aside from those two pieces of ladder, what ladder was on the job?

A. There was one extension ladder belonging to the company.

Q. Were you present the day before the accident, in the afternoon, when the foreman came on the job and something was said to him concerning some ladders were needed? A. Yes, sir, I was there.

Q. What, if anything, was said?

A. Why, I don't just know what was said in regard to the shortage of ladders. I know he told the boys. I hear him tell two of the boys to splice those two ladders together and use them.

Q. Was that done? [64–43]

A. Yes, sir, that was done.

Q. Did you see this ladder that was used for the job before the day of the accident? A. Yes, sir.

Q. What was its color and appearance?

A. It was a dark, weather-beaten ladder, unpainted.

Q. Was it rough or smooth?

A. As near as I can remember it was a rough finished ladder.

Q. Did you, from such observation of it as you

(Testimony of R. D. McMellon.)

made, see any cross-grained rungs in it?

A. No, sir.

Q. How long have you been accustomed to use ladders in the way of business?

A. For the last four or five years.

Q. Is it customary to have rungs, cross-grained rungs, in a ladder? A. No, sir, it is not.

Q. Is such a rung safe for use?

A. No, it is not, it is unsafe.

Q. You didn't observe, however, that there was any cross-grained rung in this ladder at the time before the accident?

A. No, sir, not before the accident.

Q. Was the fact that is was cross-grained observable then, by the ordinary use of the ladder without a particular inspection?

A. No, sir, it was not.

Q. When this accident happened, I understand you were about fifty feet away. What were you doing?

A. At the time of the accident I was kind of stalling around, waiting for him to finish the job he was on, so I could use [65–44] the same ladder. I had a job to do and the ladder I was using wasn't quite high enough, and I was waiting for him to finish the one he had, so I could get them.

Mr. DOVELL.—Waiting for whom?

A. For Mr. Starr.

Q. You waited then to use the ladder yourself?

A. Yes, sir.

Q. Did you notice Frank Starr working up there

(Testimony of R. D. McMellon.)

at the top of the ladder before he fell?

A. I noticed him near the top of the ladder; yes, sir.

Q. Did you observe whether he had gone higher than a place where he could hold onto the ladder with his hands?

A. No, sir, I didn't take no particular notice of it.

Q. Did not take any notice? A. No, sir.

Q. What was he doing up there, as far as you know?

A. He was fastening a cable up temporarily on the side of the building.

Q. What attracted your attention to the accident?

A. Why, I don't know whether I heard him fall, or whether I heard some of the boys call that were further up the ladder. I know some noise attracted me and turned round and saw him lying on the—

Q. Did you go where he was? A. Yes, sir.

Q. What was his condition?

A. He was unconscious when I arrived.

Q. Were you there when he was removed to the hospital? A. Yes, sir.

Q. Did his condition change any from the time that you first [66–45] saw him until he was removed to the hospital? A. No, sir.

Q. Still remained unconscious?

A. Still remained unconscious.

Q. Did you or anybody at that time take this ladder down?

A. There was two men of the company—I had

(Testimony of R. D. McMellon.)

nothing to do with it—the company sent two men out from the office to secure the ladder.

Q. Did you examine that rung at that time?

A. I did, yes, sir.

Q. What was its condition, how was it broken?

A. It was split, kind of crossways.

Q. Was the larger piece hanging down or—

A. The larger piece of it was hanging down; yes.

Q. Did you then at that time make an examination of this rung?

A. No particular examination. I just simply looked at it.

Q. Could you then detect whether or not it was cross-grained? A. Yes, sir.

Q. What was the fact as to that?

A. It was cross-grained. Nothing but a piece of cross-grained timber could split as it split.

Q. Aside from the particular break, the particular place of the break, could you see that it was cross-grained—

A. I didn't make no particular examination of it aside from where it was broken.

Q. But it was observable that it was cross-grained?

A. Yes, sir.

Q. Would that defect, that condition of the board, have been observable before the accident, if one had paid special [67–46] attention to it?

A. If they had made a close inspection of it, it would have, I think.

Q. How long had you known Frank Starr before this accident?

(Testimony of R. D. McMellon.)

A. In the neighborhood of three years. I couldn't state the exact date.

Q. What was his appearance with respect to health or sickness before the accident?

A. He always had the appearance of being very healthy.

Q. Did you ever know him to be laid off from his work, or sick, or anything, or in any manner disabled before this accident?

A. I never knew him to lose an hour's time.

Q. What was his complexion at that time with respect to color in his face?

A. Why, he was rosy complexioned fellow.

Q. What was his disposition before the injury as to being happy or unhappy?

A. He was always perfectly happy, was a jolly sort of a fellow.

Q. Have you seen him a number of times since the accident? A. I have seen him twice.

Q. What change, if any, have you noticed in him since the accident?

A. Well, he doesn't have the same healthy appearance he had before the accident.

Q. Have you noticed any change in his expression?

A. Not particularly; no. I haven't seen but very little of him, I have just seen him twice.

Q. You observed him at his work from time to time before the accident? [68–47]

A. Yes, sir.

Q. Did he appear to be a careful or careless sort of worker?

(Testimony of R. D. McMellon.)

A. I always considered him an extraordinary cautious worker, very careful.

Q. Do you know how much he was earning?

A. He was earning $3.75 per day.

Cross-examination.

(By Mr. DOVELL.)

Q. You didn't get either one of these pieces of the ladder? A. No, sir.

Q. Who got them, do you know?

A. To the best of my knowledge, Mr. Filer got one piece of them and Mr. McCartney the other.

Q. Filer got the top part and McCartney the lower part? A. Yes, sir.

Q. McCartney and Filer were fellow employees, were they? A. Yes, sir.

Q. Working in the same line of work?

A. Yes, sir.

Q. What were you all called?

A. We were classified as installers, but we were doing cable work, working in the cable department.

Q. What did you call yourself, journeyman—

A. Journeyman installers, we were called.

Q. You and McCartney and Filer were occupying the same position, were you? A. Yes, sir.

Q. Neither one was over the other? [69–48]

A. No, sir; we were all working under the direction of Mr. Smith.

Q. Now, how close an inspection would it have required to see that this rung which broke was cross-grained?

A. Well, I imagine it would have taken a careful

(Testimony of R. D. McMellon.)

examination of it before the accident.

Q. How do you mean, how careful?

A. Well, if a man got right down and probably examined the wood real carefully and close he could have noticed it.

Q. Suppose Smith had examined it to determine whether it was cross-grained or not, what would he have had to have done, would he have had to scrape the timber? A. I think not.

Q. He wouldn't had to have done that?

A. No.

Q. Would he have had to use a magnifying glass?

A. I wouldn't judge he would have.

Q. You mean to say Smith could have seen it with his naked eye if he had just taken the ladder in his hand and looked at it?

A. I think he could, yes, if he had looked at it closely.

Q. How long would it have taken him to do that?

A. I shouldn't judge it would have taken very long.

Q. Could he have done it in an instant?

A. No, I think no.

Q. He wouldn't have had to cut into the grain or anything of that kind?

A. It wouldn't have taken him very long to examine the one rung.

Q. He wouldn't have had to scrape the timber or cut into it at all? [70—49]

A. I think not. I don't know. He might have.

Witness excused.

[Testimony of J. W. Werner, for Plaintiff.]

J. W. WERNER, having been first duly sworn, testified as follows, on behalf of the plaintiff:

Direct Examination.

(By Mr. BALLINGER.)

Q. What is your full name? A. J. W. Werner.

Q. And where do you reside? A. In Seattle.

Q. What is your business?

A. Journeyman installer.

Q. For what company are you working?

A. For the Sunset.

Q. That is the Pacific Telephone and Telegraph Co., the defendant in this case? A. Yes, sir.

Q. How long have you been working for them?

A. Well, I guess about fourteen months, something like that.

Q. Fourteen months?

A. Yes, altogether. [71–50]

Q. How long had you been working for them just before this accident? A. About a half a year.

Q. You have been working for them now about half a year?

A. No, I mean half a year before the accident.

Q. How long had you been working for them befor this? A. Oh, two months, I guess.

Q. Were you brought here by the defendant in this case? A. Yes.

Q. Now, you worked. I think, for the company at the time Mr. Starr was injured? A. Yes, sir.

Q. And for quite a while before that?

(Testimony of J. W. Werner.)

A. Yes, sir.

Q. And worked, I think, in the same gang with him, did you not? A. Yes, sir.

Q. Did you work at the place where he was injured, I mean in that immediate vicinity, for two or three days before the time he was hurt?

A. I guess I was working there just about a week, I guess.

Q. How many men were working in that gang?

A. Six or seven.

Q. Was Mr. Starr one of those men?

A. Yes, sir.

Q. How many company ladders were furnished for that gang at that place?

A. Well, there was only one extension ladder.

Q. One ladder, an extension ladder?

A. Yes, two parts.

Q. Who was supposed to furnish the ladders, the company, or **[72—51]** the men?

A. The company.

Q. Did they always furnish a sufficient number before this accident?

A. Well, so long as I have been working for the company, I have been using the company ladder, only that extension ladder.

Q. Did you say that they always had ladders enough? A. No, I only saw one.

Q. How many men can work with one ladder?

A. Only one, if they got to use—only one man used the ladder, because if he didn't take so far up on the wall, two men work on each one.

(Testimony of J. W. Werner.)

Q. Two men would use a ladder if it were well up on the wall? A. Yes, sir.

Q. Did you see the two ladders that were spliced together before Mr. Starr was hurt? A. No.

Q. You didn't see those ladders before they were spliced?

A. No; I didn't see them before the accident.

Q. Where were you at the time of the accident?

A. Oh, I guess about three of four feet from the accident.

Q. Were you down near the foot of the ladder that Starr was climbing? A. Yes.

Q. What were your duties there?

A. Just gripping up the cable. I didn't do anything at that time. I was standing down on the ground right before the accident.

Q. You were down on the ground at the time of the accident? **[73—52]** A. Yes, sir.

Q. Now, did you see the ladder after it was spliced together? A. Yes, sir.

Q. Did you see the upper rung of the ladder?

A. Yes, sir.

Q. Did you observe what its color and general appearance was?

A. No, I just took a look after the accident. I didn't exactly examine it.

Q. You looked at it as one does in using an instrumentality of that kind? A. Yes, sir.

Q. Did you observe any defect in it?

A. No, sir.

Q. Whether it was cross-grained or not cross-

(Testimony of J. W. Werner.)

grained before the accident? A. No, sir.

Q. What attracted your attention to the accident?

A. Well, I just happened to look up at the time Frank, Mr. Starr, he fell down.

Q. You saw him while he was falling?

A. Yes, he was falling right straight down.

Q. Did you notice how he lit?

A. He struck the ground on his feet and then turned over.

Q. Turned over and struck on his head?

A. Yes, sir.

Q. Was he conscious or unconscious after he fell?

A. Well, he was off, unconscious for about ten or fifteen minutes, I guess.

Q. Absolutely unconscious for that length of time?

A. Yes. **[74—53]**

Q. What kind of a surface was there on that street —was it a paved surface or unpaved street?

A. It is paved.

Q. What is it paved with?

A. I guess—I guess it is stone, so far as I remember.

Q. Just before Frank fell what was he doing?

A. He was hanging up cable, along, going to cleat up the wall.

Q. Was he well up toward the top of the ladder?

A. That time he was not, he cleat up, hang up the cable—he was not up on the top of the ladder. He was working, I don't know how long, he was working on the ladder—I guess about ten or fifteen minutes before he went up on the top of the ladder.

(Testimony of J. W. Werner.)

Q. When he went up to the top, how was he, in what position was he, where were his hands?

A. He was holding the cable with his right hand and trying to drive a nail between the—trying to put a piece of wire on the nail in the cable.

Q. How did he have his right hand, was it up by his head?

A. His right hand being about that way (indicating).

Q. Was the cable in the palm of his hand?

A. The cable, I guess—

Q. He had then the palm of his hand somewhat upwards, and the cable resting in the palm of his hand in that manner, (indicating)? A. Yes.

Q. The left hand was holding a wire, you say?

A. Yes, holding the wire to put on the nail.

Q. To wrap it around the nail? **[75—54]**

A. Yes, sir.

Q. Was that position the natural and ordinary position of a line man putting up cable in that manner? A. Yes, that is the only way.

Q. Would you say that he had any opportunity in doing his work to hold on to anything, that is to say, to hold on to the side of the ladder, or to brace himself in any way, or were his hands occupied fully?

A. Well, he was standing close to the wall and he was hanging up the cable. He didn't have hold of anything except the cable.

Q. Had you observed anything wrong with the ladder before the accident?

A. No, I didn't look at it.

(Testimony of J. W. Werner.)

Q. Did you see the ladder and the rung which gave way, immediately after the accident?

A. Yes, right after the accident.

Q. What rung was broken?

A. It was the second one from the top.

Q. It was the second one from the top?

A. Yes, sir.

Q. In what manner was it broken, straight across or in a slanting direction?

A. Slanting down, from the left side down to the right.

Q. How long have you been accustomed to use ladders in your work?

A. I have been working in the business for about eight years, and been using a ladder right along.

Q. What is the fact as to whether a ladder with a cross-grained rung is safe or unsafe, what is the fact of that? [76—55]

A. Well, I don't know that they were. The most of the ladders I have been using, was a long one like an extension ladder.

Q. Suppose a ladder had a cross-grained rung, is the fact of it being cross-grained an element of danger, or not? A. I suppose; that is hard to tell.

Cross-examination.

(By Mr. DOVELL.)

Q. Is this the ladder? (Indicating ladder.)

A. Yes, sir.

Q. And is this ladder in the same condition, in exactly the same condition as it was immediately

(Testimony of J. W. Werner.)
after the accident happened? A. Yes, sir.

Q. You have examined it so that you can say that?

A. Yes.

Mr. DOVELL.—I would like to offer the ladder in evidence as part of the cross-examination of the witness.

(Whereupon said ladder was admitted in evidence as marked Defendant's Exhibit "1.")

Mr. BALLINGER.—I have no objection.

Q. This is the rung which was broken, is it?

A. Yes, sir.

Q. This was the rung, then, upon which he was standing at the time he fell? A. Yes, sir.

Mr. DOVELL.—I would like at some period during the trial to have **[77—56]** the Court and each member of the jury come down closely and examine the rung.

Mr. BALLINGER.—Might not the rung—he says this special rung—of course, the record doesn't show what he was pointing to. Might that not be designated in some appropriate way?

By the COURT.—I think that would be better.

Mr. DOVELL.—Let a card be tied to it and we can write on the card the rung upon which the plaintiff was standing at the time.

Mr. BALLINGER.—It is the only rung which appears on the Exhibit to be loose from the ladder on either end.

Mr. DOVELL.—Let it go into the record the witnesses have testified the rung on which the plaintiff was standing at the time the accident occurred is

(Testimony of J. W. Werner.)

the rung which appears broken upon the ladder. I think there is no dispute about that fact.

Redirect Examination.

(By Mr. BALLINGER.)

Q. This ladder, did you notice what became of it at the time of the accident?

A. We took it up to the office on 5th Avenue.

Q. And it was left there?

A. Well, I was one of them that carried it up.

Q. When did you next see it?

A. This is the first time I saw it after.

Q. This is the first time since the time you took it to the office immediately following the accident? **[78—57]** A. Yes, sir.

Recross-examination.

(By Mr. DOVELL.)

Q. You didn't procure either part of this ladder, did you? A. No.

Q. You didn't get either part of it? A. No.

Witness excused. **[79—58]**

[Testimony of C. F. Dalton, for Plaintiff.]

C. F. DALTON, having been first duly sworn, testified as follows on behalf of the plaintiff:

Direct Examination.

(By Mr. BALLINGER.)

Q. What is your name? A. C. F. Dalton.

Q. What is your business?

A. Apprentice installer.

Q. Where do you reside? A. Seattle.

Q. How long have you been engaged in the

(Testimony of C. F. Dalton.)

business? A. About two years, with one lay off.

Q. Are you working for the defendant now?

A. Yes, sir.

Q. You were brought here as one of their witnesses? A. Yes, sir.

Q. How long have you been working for the company this time?

A. A little over a week, about two weeks.

Q. And before that what period did you work for them?

A. From January, 1911, until January, 1912.

Q. Were you acquainted with Frank Starr?

A. I was at the time he got hurt working with the company.

Q. Did you work in the same gang, bunch of men with him? A. Yes, sir.

Q. Under whose foremanship? A. Mr. Smith.

Q. The gentleman who testified this morning?

A. Yes, sir. [80—59]

Q. Were you working at the place of the accident at the time of Mr. Starr's accident? A. Yes, sir.

Q. How long had you been working in that vicinity? A. Four days.

Q. Do you recall how many men were working there? A. Six or seven.

Q. Was Mr. Starr one of them? A. Yes, sir.

Q. How many ladders did the company furnish for that work?

A. There was only one ladder that I know of that belonged to the company on the job.

Q. Who was supposed to furnish the ladders for

(Testimony of C. F. Dalton.)

the use of the men? A. The company was.

Q. Did they always furnish a sufficient number?

A. No, sir, not when we were in the gang.

Q. When the number of ladders on the job was insufficient, what did the foreman do?

A. If he couldn't procure them, he would tell us to rustle them, get them any way we could.

Q. I call your attention to the ladder which was introduced by Mr. Dovell on cross-examination of the last witness, Defendant's Exhibit "1." Do you recall how the pieces of that ladder came on the job?

A. Yes, sir.

Q. Who got the lower piece?

A. Mr. McCartney.

Q. Do you know how long before the accident?

A. I couldn't say whether it was one or two days I saw him [81—60] with it a day before.

Q. Who got the other piece?

A. I don't know but I saw Mr. Filer working on it the day before.

Q. What was he doing?

A. Putting up terminal boxes.

Q. How high are those boxes from the ground?

A. Supposed to be at least 6 or 7 feet.

Q. What was Mr. Starr doing the day before the accident?

A. Cleating a cable on a building just south of where he was at the time of the accident.

Q. That was the day before the accident?

A. Yes.

Q. Was he using ladders that day? A. No, sir.

(Testimony of C. F. Dalton.)

Q. What was he using?

A. He was in a bolstering chair hung from the roof.

Q. Did you ever see him using either one of those pieces of ladder before the day of the accident?

A. No, sir.

Q. Were you present when the foreman, Mr. Smith, came to where you men were working the afternoon before the day of the accident?

A. Yes, sir.

Q. Did you hear any conversation about ladders?

A. Yes, the men were asking for ladders.

Q. What did he say?

A. I couldn't say just what he did say.

Q. Did you hear him say anything about splicing them? A. No. [82–61]

Q. You didn't? A. No.

Q. Where were you at the time of the accident?

A. About fifty feet south.

Q. What was Mr. Starr doing at the time of the accident?

A. Tying a cable to the wall of the building.

Q. About how high above the surface of the street?

A. Practically the full length of the ladder—20 feet, I should judge.

Q. Did you see him at the moment of the accident, and what he was doing at that moment?

A. No, not at that moment. I saw him probably a few minutes before the accident.

Q. What was he doing specifically at that time?

A. Tying this cable up.

(Testimony of C. F. Dalton.)

Q. In what attitude was he?

A. Looking up at the cable, or at the position where he was going to tie the cable.

Q. Where were his hands and what were they occupied with?

A. They were above his head, one hand on the cable in that position, and the other hand attempting to tie it around the nail.

Q. To describe your attitude, now, I should say his right hand was up at the level of his head, palm upward, holding the cable in, and the left hand was also above his head, and with it he was attempting to tie a wire around a nail, is that correct?

A. That is it.

Q. What was his position in reference to the top of the ladder, that is, was he near the top of the ladder, or not? [83–62]

A. Yes, he was practically at the top of the ladder.

Q. Was that attitude the ordinary attitude of doing that sort of work in that kind of place?

A. Yes, sir.

Q. State what you observed with reference to this accident. A. What I know about it, you mean?

Q. Yes.

A. Well, I saw him—we were coming down—McMellon and I were coming down off the roof just about the time the accident happened and we were facing south, when I heard McCartney shout out, and I turned around and saw Mr. Starr was lying on the ground.

Q. What was the surface of the street? Was it

(Testimony of C. F. Dalton.)

paved or unpaved? A. Paved.

Q. With what? A. Rough cobble-stones.

Q. Did you go to where Mr. Starr lay?

A. Yes, sir.

Q. What was his condition?

A. He was unconscious when I got there.

Q. Did you remain there until he was removed to the hospital?

A. Yes, I helped take him to the hospital.

Q. What was his condition on the way there and upon arrival at the hospital?

A. When he came to he seemed to be in pain awfully and then he lapsed into unconsciousness again.

Q. Did you examine the ladder after the accident to ascertain the cause of the accident?

A. No, I went up there to see how it happened, and I noticed the piece of the rung hanging down, and the ladder was up [84–63] at the wall at that time. I couldn't see very closely.

Q. Had you observed this ladder before the accident?

A. I saw Mr. Filer working on it as I passed by. Didn't examine it.

Q. Did you observe it after it was spliced just before the accident?

A. No, I saw it from a distance, Mr. Starr working on it after it was spliced.

Q. You merely just saw it. You made no examination? A. No.

Q. Did it appear to you at that time to be defect-

(Testimony of C. F. Dalton.)

ive in any respect?

A. I couldn't see any defect in it.

Q. You made no special examination, I presume, to ascertain how the condition was, and there was nothing to attract your attention? A. Nothing.

Q. Were you acquainted with Mr. Starr before his injury? A. Yes, sir.

Q. What sort of a complexion did he have?

A. Very robust complexion and healthy.

Q. Was there any red in his cheeks?

A. Yes, sir.

Q. To about what extent?

A. Well, I noticed during the winter time on the cold days his face would be awfully red.

Q. What would you say as to his complexion whether it appeared healthy or— A. Healthy.

Q. Healthy complexion with color in his cheeks? [85—64] A. Yes, sir.

Q. What appeared to be the condition of his health before the accident?

A. I couldn't see anything the trouble with him.

Q. Did you ever know of his being detained from his work by sickness?

A. No, sir, not while I knew him.

Q. What was his disposition as to being a happy one or unhappy one?

A. Always seemed to be happy—general good fellow.

Q. Have you seen him since his accident very often?

(Testimony of C. F. Dalton.)

A. No, I haven't seen him more than three times.

Q. Have you observed any change in his complexion since the accident? A. Yes, sir.

Q. What is that change you are speaking of?

A. Oh, his features seem to be drawn, and he has a blank stare in his eyes. I noticed it the first time I saw him after the accident.

Q. Was that drawn appearance in his face before the accident? A. No, sir, I never noticed it.

Q. Or the stare you observe in his face?

A. Not before.

Q. Have you observed any difference in his complexion? A. Oh, yes.

Q. What difference? A. Pale.

Q. He is pale now? A. Yes, sir.

Q. Have you observed any difference in his appearance with [86–65] reference to an appearance of happiness or unhappiness? A. Oh, yes.

Q. Just describe that change as you have observed it.

A. I can't describe it. You know you couldn't say he was the same man he was before the accident, that's all.

Q. Had a different appearance?

A. Different appearance.

Cross-examination.

(By Mr. DOVELL.)

Q. Did you see McCartney and the plaintiff splicing the ladder? A. Yes, sir.

Q. How long did it take them to do it?

A. I couldn't say.

(Testimony of C. F. Dalton.)

Q. About how long would you say?

A. I couldn't say. I was probably only looking at them a moment.

Q. How long was the plaintiff on the ladder before it broke?

A. From the time he commenced in the morning, I couldn't say definitely what time he did go on the ladder.

Q. You commenced at eight o'clock?

A. I don't know whether he went up on the ladder at eight o'clock, or whether it was after eight o'clock.

Q. Did you notice him from time to time for that hour and a half up on the ladder? A. Yes, sir.

Q. You were, of course, attending to your own work, but I take it you would notice him? [87–66]

A. Whenever I looked around up that way, of course, he would always attract my attention.

Q. During that hour and a half? A. Yes, sir.

Q. Could you tell how high up he was on the ladder during that time?

A. Well, he was the full length of it.

Q. Up near the top rung?

A. As near as he could get without being so close to the building he would lose his balance.

Q. During all of this time?

A. As far as I remember.

Q. See if I can get you clear. You began work at eight o'clock—this happened about half-past nine?

A. About that time.

Q. During that time, from time to time, you would

(Testimony of C. F. Dalton.)

turn around from your work and see him on the ladder, during that time? A. Yes, sir.

Q. And when you would see him he was up near the top of the ladder?

A. Somewheres up near the top, yes.

Witness excused.

[88–67]

[Testimony of Frank Starr, on His Own Behalf.]

FRANK STARR, the plaintiff, testified as follows, on his own behalf:

Direct Examination.

(By Mr. BALLINGER.)

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. How old are you? A. Twenty-five.

Q. When did you attain that age?

A. November the 16th, 1911.

Q. What was your occupation prior to the injury that has been testified to? A. Electrician.

Q. How long have you pursued that calling?

A. About six or seven years.

Q. What were your wages at the time of your injury? A. $3.25.

Q. Per— A. Per day.

Q. How long had you worked for the defendant company at the time of your injury?

A. About four years.

Q. And had you worked steadily or only occasionally? A. Practically steady.

Q. What was the condition of your health before

(Testimony of Frank Starr.)

your injury? A. Well—

Q. Was it good or bad?

A. It was good. [89–68]

Q. Had you ever occasion to cease work on account of ill health? A. No, sir.

Q. Have you had an occasion to consult a physician at any time during this four years? A. No.

Q. You were working, I understand, in a gang of six men under the foremanship of Mr. Smith who testified this morning? A. Yes.

Q. And you were working in Post Street, between Pike and University, at the time of your accident and for some days before that?

A. Yes, sir.

Q. How long before that had you been working in this vicinity? A. About four days.

Q. Post Street was then paved or unpaved?

A. Paved.

Q. Is it level in a north and south direction or was there a slope? A. Slope.

Q. In which direction did it slope downward?

A. Sloped south.

Q. What was the particular work that you were doing in this vicinity?

A. I was hanging cable then.

Q. How high up was it being hung and on which side of the street?

A. About 20 feet high on the east side.

Q. How was it being supported—I mean to what kind of support, buildings or poles, or what? [90—69] A. Buildings.

(Testimony of Frank Starr.)

Q. Who was supposed to furnish the ladders for use in this work that you were doing?

A. The company.

Q. Did they always supply a sufficient number?

A. No, sir.

Q. On the occasions when the men had an insufficient supply of ladders, what, if anything, would the foreman do? A. He would tell us to rustle.

Q. Would you men rustle the ladders then, when he so ordered? A. Yes, sir, had to.

Q. How many men could use a ladder at one time?

A. Well, only one man could use the ladder—but there was generally two there.

Q. The second one being engaged in doing what?

A. Attending on the man on the ladder, or watching the bottom, so the wagons wouldn't hit it.

Q. What is that?

A. That is handing tools and things to him, and watching the bottom, so that no wagons could hit the bottom of the ladder, at some of those alleys where they passed through.

Q. If there were six men working, how many ladders would they need, if their work was 20 feet above the surface of the ground?

A. They would need at least three.

Q. How many ladders did the company furnish directly for that work at that time and place?

A. One.

Q. You have heard testimony concerning the use of two ladders, one of which may be designated as the Filer ladder, **[91—70]** and the other as the

(Testimony of Frank Starr.)

McCartney ladder? A. Yes, sir.

Q. Do you remember those ladders were on the job? A. Yes, sir.

Q. Did you use either of those ladders at any time before the day of your accident?

A. I never.

Q. What kind of support did you have to hold you up to your place of work on the days before the day of your accident?

A. I was working on the chair, swung from a pulley on the top of the building.

Q. Now, I understand you to say you used neither one of those ladders before the day of your injury?

A. No, sir.

Q. Do you know who was using the top piece there, the short ladder?

A. I noticed it was Filer working on it.

Q. Did you ever examine that ladder?

A. That is not in particular; no.

Q. You saw him though, using it? A. Yes, sir.

Q. Did you see the other ladder in use, also?

A. Yes, sir.

Q. Did you examine that with any particularity?

A. Not carefully, no.

Q. You saw it though on the job?

A. I saw it, glanced at it.

Q. Did such observation as you gave to the ladders, or either of them, disclose any danger about them?

A. No, sir, I thought they was perfectly safe.

(Testimony of Frank Starr.)

Q. Now, did you see the foreman on the job there the afternoon before the accident? A. Yes, sir.

Q. What, if any, conversation did you have with him, or hear the others have with him about ladders?

A. Why, I asked him for a longer ladder then.

Q. What did he say?

A. He said he couldn't get any, he said to splice the ones that is on the job.

Q. What ones were on the job to which he referred? A. These two.

Q. Now, was that ladder spliced—were those ladders spliced? A. Yes, sir.

Q. By whom were they spliced?

A. By McCartney and myself.

Q. Just what hand did you have in it, just what did you do in connection with it?

A. Well, I rustled wire, mostly. That is, McCartney did practically the work. I held it in place and got a couple of pieces of wire to wire it.

Q. You got the wire for it and held it in place while he spliced it? A. Yes, sir.

Q. Did you at any time before your accident know that there wasn't a cross-grained step in either of these ladders? A. No, sir.

Q. How long were you accustomed to work with ladders? A. About four years.

Q. Is it common for rungs of ladders to be made of cross-grained **[93—72]** pieces of wood?

A. No, sir, it is not.

Q. Would you say that this was rare or only occasionally?

(Testimony of Frank Starr.)

A. It is very seldom you will find them.

Q. Is such a rung safe for men to go up on?

A. No, sir, it isn't safe.

Q. If you had known that there was a cross-grained rung there would you have gone up on it?

A. No, sir, I wouldn't.

Q. Now, tell the Court and jury all you recollect about your accident.

A. I remember of asking Smith for a long ladder and he said, "Splice the ones you got." That was in the afternoon of Sept. the 14th, on Thursday. It was about four o'clock, so even then I asked McCartney to get off the ladder he was on, and he said, "No," because if he had got off he would have had to use the other one, so he came down, and we both spliced the ladder and then we never used the ladder that evening, we never used the ladder until the next morning.

Q. What time did you go to work the next morning? A. Eight o'clock.

Q. Now, just tell how much you recollect about the events of that day.

A. After going to work at eight o'clock, that is all I know.

Q. That is all you can remember?

A. That is all I remember.

Q. Do you remember going on this ladder at all?

A. No, sir.

Q. Do you remember falling from it? **[94—73]**

A. No, sir.

Q. You have no recollection of that except that

(Testimony of Frank Starr.)

you went to work on that day? A. That is all.

Q. What was the condition of your health before the accident, with respect to your ability to sleep?

A. I slept fine.

Q. What time were you accustomed to go to bed?

A. On the average of about ten o'clock.

Q. And what time were you accustomed to rise?

A. About seven.

Q. During this interval how much would you give over to sleep, how much of that time, would you sleep all the time or part of that time?

A. Sleep all the time, quick as I would get to bed, sleep.

Q. In what way would you rise, refreshed or unrefreshed? A. Refreshed.

Q. What is the first recollection you have after your accident? How long after your accident?

A. The first I remember is in the hospital when McCartney and his little girl was sitting beside me.

Q. How long was that after the accident?

A. I didn't know what day it was then. I found out since it was on Sunday.

Q. And you were injured on Friday?

A. I was injured on Friday.

Q. So you have no recollection of anything that occurred between eight o'clock on Friday morning and some hour of Sunday when Mr. McCartney and his little girl were visiting you? [95—74]

A. No, sir, not a thing.

Q. Now, during that time were you unconscious all the time or only during part of the time?

(Testimony of Frank Starr.)

A. I don't remember of a thing.

Q. Then, so far as you now know you were not conscious during that period, you have no conscious recollection? A. No.

Q. State what physical injuries you received, I mean as distinct from nervous injuries, anything of that sort, whether there were any bones broken.

A. The bone in my heel was broken.

Q. Which heel?

A. Right heel, and my head was fractured.

Q. Now, state whether or not that occasioned you any pain from these injuries.

A. It does, both of them, that is not real pain in my head; not now.

Q. Was the head painful for a time?

A. It was for three months afterwards.

Q. Now, what experience of headaches did you have before your injury?

A. I don't understand you.

Q. Were you accustomed to have headaches before your injury?

A. I never knew what the headache was.

Q. Have you any since?

A. Not a day passes but what I have it.

Q. To what extent of severity?

A. Well, it is different at different times. Sometimes I think my head will break open.

Q. Has that continued ever since the time you were injured to [96—75] the present time?

A. Ever since.

Q. How has your sleep been since your injury?

(Testimony of Frank Starr.)

A. I sleep on the average about four hours a night.

Q. Is that sleep sound or disturbed?

A. Disturbed. I generally wake up every hour or two, the least noise I hear.

Q. Were you accustomed to dream before your injury? A. Before, no.

Q. How about it now?

A. Well, I have all kinds of dreams.

Q. Are the dreams frequently of an unpleasant nature? A. Yes, very.

Q. What other phenomena have attended your sleep since your injury?

A. I have such an awful time going to sleep, in the first place. I get sleepy every night early and then if I go to bed I can't get to sleep—just a continual roaring, singing, coming out of the left ear.

Q. Have you ever walked in your sleep?

A. Yes, sir.

Q. Before the accident at any time?

A. Not before the accident, no.

Q. Have you since? A. Yes, sir.

Q. When did you first walk in your sleep after the accident? A. At the hospital.

Q. When you awakened where were you?

A. I was on, I think it was the third or fourth floor, where there was a big building, built out this way here, [97—76] and here it was vacant, and my room opened right out on that, and it was the Providence hospital, and the building wasn't finished, and there was no railing along there, and in

(Testimony of Frank Starr.)

the night some time, I don't know what time, the nurse saw me standing on the edge of that on one foot. How I got there I don't know, because I couldn't put my weight on my right foot.

Q. Was that experience effected by nightmares?

A. Yes, you might say that was a nightmare then.

Q. Now, what is your experience on waking up, after such sleep as you get in a night. Are you refreshed or unrefreshed?

A. Feel just the same as I did before I went to sleep.

Q. Have you had any trouble with your left ear since the accident?

A. I can hear out of it a very little bit.

Q. You can hear but very little? A. Yes, sir.

Q. How was the ear before your injury?

A. Just as good as my right ear, and that is good.

Q. Is it now?

A. My right ear; yes, sir.

Q. Your right ear is still perfectly normal?

A. Yes.

Q. Is your left ear so? A. No.

Q. What is your experience with respect to dizziness, or anything of that sort?

A. Right after I got hurt, I couldn't look up or down, I couldn't bend over, if I did there was a dizziness, made me [98—77] sick, want to vomit. Now, when I go to bed at night I can't sleep on my left side, that same dizziness comes on me, but not as bad as it did at first.

Q. You said, I think, that you have a continual

(Testimony of Frank Starr.)
roaring in your left ear? A. Yes, sir.

Q. What has been the condition of your nervous system since your injury?

A. Well, I am awfully nervous.

Q. Continually or only occasionally?

A. Continually.

Q. Are you able to climb, as before the accident?

A. No, sir.

Q. Why not?

A. I would be afraid to get off the ground. If one of those dizzy spells would come over me, what would I do?

Q. How about your right heel, what has been the course of that injury?

A. Why, it was broke, and even now in walking along the street, all at once it will start paining me. I have got to go sit down, can't walk on it.

Q. Suppose you walk any distance, what is the condition of the foot the next day?

A. It is stiff.

Q. Do you experience any pain in the use of the foot? A. At times, yes.

Q. Under what circumstances?

A. Why, if I would use it too much one day, the next day it is stiff, and when I bend it, it hurts. If I am walking along the street sometimes it will just naturally start **[99—78]** hurting and I don't know what caused it, unless it turns it or something.

Q. Have you done any work since your injury?

A. No, sir.

Q. Have you been able to do any work?

(Testimony of Frank Starr.)

A. No, sir.

Cross-examination.

(By Mr. DOVELL.)

Q. I understand you to say you don't remember anything which occurred upon the morning you were injured? A. No, sir.

Q. You don't remember that at all?

A. I don't remember a single thing of it.

Q. You didn't work upon this ladder the night before at all? A. No, sir.

Q. But that afternoon some time you and McCartney spliced the two ends together?

A. Yes, sir.

Q. How long were you working on that, how long did it take you?

A. How long would it take me to splice them?

Q. Yes.

A. I don't know, I never timed, but it would be around about a half hour.

Q. You were working about a half hour splicing it. Now, what was the matter with the rung there which broke, what caused it to break?

A. It is cross-grained, I can see now. **[100—79]**

Q. Mr. Smith was your foreman? A. Yes, sir.

Q. He couldn't have told it was cross-grained by looking at it before, could he?

A. Not by just glancing at it, no, sir.

Q. He couldn't have told by looking at it closer, could he?

A. If he had got right down close and been looking for a cross-grain he would have found it, yes.

(Testimony of Frank Starr.)

Q. Now, explain that, you think he could have told—you think Smith could have told so as to have kept you off the ladder if he had gotten down close to it and looked at it closer?

A. He could; yes. The same as one of those others were cross-grained, and he didn't know it.

Q. Come and show the jury.

Mr. BALLINGER.—Ordinarily, one doesn't object to any question asked of the plaintiff, but this is clearly not cross-examination. All he testified in direct was that he made no special examination of it, but that in glancing at it he had seen no defect in it. But whether it was not only defective, or whether the defect was one which might be ascertained by an examination, was not drawn out at all in chief, and having a client with a head injury and nervous, I feel that I am justified in having him confined in the cross-examination.

Mr. DOVELL.—I won't agitate him. The witness can tell me at any time. He has testified it was defective.

Mr. BALLINGER.—I think not. I may be mistaken, but my impression is he simply testified he saw nothing about it to indicate any defect, and he hasn't testified to the accident at all. **[101—80]**

Mr. DOVELL.—I think I have a right to cross-examine to ascertain.

By the COURT.—Objection overruled, exception allowed.

Q. Do you think the rung, by a close inspection, shows that it is cross-grained?

(Testimony of Frank Starr.)

Mr. BALLINGER.—I think that is not cross-examination.

By the COURT.—I think that is a question for the jury.

Q. Who got the two pieces of the ladder which were spliced together?

A. McCartney got the bottom part and Filer got the top.

Q. You know that of your own knowledge, do you?

A. I didn't see them borrowing them, no, but I saw them using them before.

Q. In other words, the company did not furnish either one of those pieces? A. No.

Q. Filer and McCartney, two men who were working in the same capacity you were, were they—

A. Yes, sir.

Q. Went and got them somewhere?

A. Yes, sir.

Q. The day before. The lower portion was probably gotten two days before? A. Yes, sir.

Q. The upper portion the day before, the same day you spliced them together, the upper portion?

A. I don't remember exactly whether it was got the day before or not, but it was got a day or two, something like that.

Witness excused. [102—81]

[Testimony of Dr. U. S. Bates, for Plaintiff.]

And thereupon Dr. U. S. BATES, a witness on behalf of the plaintiff, was duly sworn and testified that the plaintiff had had a fracture of the heel-

(Testimony of Dr. U. S. Bates.)

bone, which is known as the os calcis, and a fracture of the base of the skull, involving the left side of the face, extending into the ear. He testified that such an injury would be likely to produce concussion of the brain. He further testified that plaintiff now had an interference with his hearing in the left ear, so that he could barely hear a watch tick in that ear. He further testified that he had examined the plaintiff recently, and found that there is about one inch difference in the measurements of the right and left foot, which difference he attributed to the injury arising out of the accident complained of. He further testified that the bony union of the fractured bone in the foot was good, and that there is practically no deformity as a result of the fracture, but that there seems to be some swelling of the soft tissues of the ligaments, and in the opinion of the witness there is some pain in walking. The witness further testified that if the symptoms of which the plaintiff complains are real, plaintiff would not be able to do a hard day's work. The witness further testified that the plaintiff had improved since he saw him last fall, but that he didn't believe he would ever be as well as before the accident, but that he believed his youth and former condition of health would tend toward the improvement of the plaintiff, and that he believed his right foot and heel would bother him more or less the balance of his life. The witness further testified that the plaintiff does not limp, but that he believed the plaintiff would "incapacitated for hard physical

(Testimony of Frank Starr.)

labor, where he has to stand on his feet all day." **[103—82]**

[Testimony of Dr. A. W. Hawley, for Plaintiff.]

Thereupon Dr. A. W. HAWLEY, being thereupon sworn as a witness on behalf of the plaintiff, testified in effect as Dr. Bates had testified. **[104—83]**

[Testimony of Frank Starr, on His Own Behalf (Recalled—Cross-examination).]

FRANK STARR, recalled.

Cross-examination.

(By Mr. DOVELL.)

Q. What did you weigh at the time of the accident? A. About 160 pounds.

Redirect Examination.

(By Mr. BALLINGER.)

Q. What do you weigh now?

A. I haven't weighed myself yet.

Q. The last time you weighed did you notice any deviation from your ordinary weight?

A. About ten pounds.

Q. Lighter or heavier? A. Lighter.

Witness excused.

Whereupon plaintiff rested. **[105—84]**

And thereupon the defendant, to maintain the issues on their part to be maintained, introduced and offered in evidence the following testimony, to wit:

[Testimony of E. T. Filer, for Defendant.]

E. T. FILER, having been first duly sworn, testified as follows on behalf of the defendant:

Direct Examination.

(By Mr. DOVELL.)

Q. What is your name? A. E. T. Filer.

Q. What is your business?

A. Telephone electrician.

Q. Were you one of the gang of men working with Mr. Starr at the time this accident happened?

A. Yes, sir.

Q. How many of you in that gang?

A. Oh, presumably five or six.

Q. You have seen the ladder which I have introduced in evidence here? A. Yes, sir.

Q. That is the ladder from which Mr. Starr fell?

A. I believe it is.

Q. And it is in the same condition now that it was— A. The same practical condition.

Q. You notice the ladder is in two parts, two parts spliced together? A. Yes, sir.

Q. Do you know where those two parts came from? **[106—85]** A. One portion I know.

Q. Which portion?

A. The second upper portion.

Q. The top portion?

A. That would be the second, there is three portions to that ladder.

Q. Just tell the jury if you got this portion of the ladder, where you got it.

A. The upper portion I got in a passage-way be-

(Testimony of E. T. Filer.)

tween First Avenue and Post Street, presumably gotten about one-fourth of the distance from Pike; that is one-fourth of the distance between Pike and Union Street.

Q. Do you know whose ladder it was?

A. No, I don't.

Q. Did you ask anybody for it? A. No.

Q. Just went and took it? A. I took it.

Q. The company didn't furnish it? A. No, sir.

Q. Is this entire upper portion, including these slats here—when you went and got the ladder, how did you find it?

A. The top portion there was not on the piece which I got.

Q. This part was not on (indicating)? A. No.

Q. Who put that on? A. I don't know.

Q. You just got this portion (indicating)?

A. Yes, sir.

Q. Do you know who got the other portion? **[107—86]** A. Presumably Mr. McCartney.

Q. The company didn't furnish either?

A. No, sir.

Q. Did you see the accident? A. No, sir.

Q. You weren't there at the time?

A. Not precisely at the time. I was there forward and afterward.

Cross-examination.

(By Mr. BALLINGER.)

Q. How did you happen to get this ladder?

A. I was detailed to put up two terminal boxes.

Q. By whom? A. Mr. Smith.

(Testimony of E. T. Filer.)

Q. The foreman? A. Yes, sir.

Q. Then, how did you happen to get the ladder?

A. Well, the first part was at a height which necessitated a small ladder, so I went in the vicinity and found this upper ladder.

Q. Did you speak to Mr. Smith about it?

A. No, sir.

Q. Ask him for a ladder?

A. No, not in that case.

Q. The company was supposed to furnish these ladders?

A. Yes, they were supposed to furnish ladders.

Q. How long was it before the accident that you got this ladder? **[108—87]**

A. Well, according to my recollection, I believe two or three days.

Q. And you used it as you had occasion for a short ladder up to the time of the accident? A. Yes.

Q. No one else used it to your knowledge?

A. Well, I couldn't say as to whether anyone else used it.

Q. To your knowledge?

A. To my knowledge, no.

Q. The boxes were about seven feet up?

A. Well, say one was about six feet, the other was eight feet, or possibly nine or ten. One was at a higher height than the other one.

Q. You don't recollect just how high?

A. Well, approximately we will say six feet for one and eight for the other.

(Testimony of E. T. Filer.)

Redirect Examination.

(By Mr. DOVELL.)

Q. Was it uncommon for the men working as you were working to have to—as one of the witnesses expressed it—rustle ladders?

A. It was not uncommon. It wasn't particularly common.

Q. It was not uncommon? A. No.

Recross-examination.

(By Mr. BALLINGER.)

Q. Were you directed by the foreman to rustle ladders from [109—88] time to time?

A. I don't know that. I couldn't say I was particularly directed, but if we were short of ladders at a particular time, why, it was understood that we would go ahead with the work just the same, that would mean we would have to get them.

Q. The work had to be done?

A. Had to be done.

Q. You didn't consider you were engaged in the procurement of ladders for the gang to work on, but simply that where the company had failed to furnish a sufficient number, then it was understood that it was your duty to rustle?

A. Well, I wouldn't say it was my duty to rustle them, but if for instance I had to put up a terminal box, I would naturally go and get a ladder to put one up.

Q. Did you consider that you were doing the company's work in supplying this ladder?

(Testimony of E. T. Filer.)

A. Well, I don't know whether I would consider doing their work or not. I would have to go and get the ladder or something on which I would be able to reach the height, or get up to the height.

Q. The work had to be done?

A. The work had to be done.

Q. If the company failed to supply the ladder, you either had to supply it yourself or remain idle?

A. Approximately, yes.

Q. And it was the understanding that it was your duty to rustle it if the company failed to supply it?

A. We would have to do the work. **[110—89]**

Redirect Examination.

(By Mr. DOVELL.)

Q. I forgot to ask you, I think, after you got the ladder did you use it? A. Yes, sir.

Q. For what purpose?

A. Putting up a terminal box at a height of about six feet.

Q. Then, did you discard it?

A. For the next box I did.

Q. Why?

A. Because it was sufficiently long, that is sufficiently long enough, and I questioned its safety.

Q. Why did you question its safety?

A. It looked rather frail.

Q. And what did you do for a ladder?

A. I made up another one.

Q. Got the material there and made it up?

A. I found two pieces of two by four, with a few rungs off on the ladder, right on the bottom por-

(Testimony of E. T. Filer.)

tion, and then I added two.

Q. How long a ladder did you make?

A. That made a ladder probably seven, or possibly eight feet.

Q. That was the day before this accident happened?

A. I couldn't say as to the exact date, but previous to the accident.

Q. Just the day before, or fix it as nearly as you can?

A. Practically a couple of days before. **[111—90]**

Recross-examination.

(By Mr. BALLINGER.)

Q. You say you discarded this because you believed it unsafe?

A. I didn't want to go to the top on this ladder, so I thought I would get something more substantial.

Q. You did that because you were afraid that the ladder might not be safe?

A. That is, if I were to reach the top of the ladder, put my weight on the top of the ladder.

Q. Did you notice the cross-grain of that?

A. No, I didn't notice the cross-grain.

Q. But it looked like a frail ladder?

A. It looked like a frail ladder.

Q. Did you call the attention of the boys working on the job to your having discarded it, or the reason you did it? A. I don't recollect that I did.

Q. You didn't say anything to any of them about

(Testimony of E. T. Filer.)

it, to your recollection? A. No.

Q. Did you to Mr. Smith? A. No.

Witness excused.

Whereupon defendant rested.

[Motion for Entry of Judgment for Defendant.]

Mr. DOVELL.—I desire, if your Honor please, to submit a challenge to the testimony because of the legal insufficiency **[112—91]** thereof, and move the Court to enter judgment for the defendant.

(Argument by counsel.)

And there being no other or further testimony, admissions or exhibits, the above and foregoing is all the evidence adduced at this trial of this cause.

Whereupon court adjourned until Wednesday morning, October 9, 1912, 10 o'clock.

[Order Denying Motion for a Directed Verdict.]

By the COURT.—The motion for the directed verdict in this case will be denied and exception allowed.

[Instructions.]

And thereupon, at the conclusion of the argument by counsel, the Court instructed the jury as follows:

GENTLEMEN OF THE JURY:

This is an action brought by the plaintiff, Frank Starr, against the defendant and the Pacific Telephone and Telegraph Company, to recover for certain personal injuries alleged to have been inflicted upon the plaintiff through the negligence of the defendant on or about the 15th day of September, 1911.

Briefly, the plaintiff alleges that his injuries were

occasioned by the breaking of the top rung of a ladder, which rung—the plaintiff alleges the top rung, but the testimony showed it was another,—so I say by the breaking of a rung of **[113—92]** the ladder, which rung he claims was defective in this, that it was cross-grained, so that the same was weak and unfit for use and too weak to hold the weight of a man standing upon it; that this defective condition could have been ascertained by an inspection by the defendant or its foreman, but that no such inspection was made, and he further alleges that he did not know that the rung in question was defective, weak or insufficient, and that he was not warned thereof, that he supposed the rung was sufficient for his use in the performance of his work; that in the performance of his work he stood upon the rung in question, when the same broke and he fell some 20 feet to the surface of Post Street, which was paved, and thereby received the injuries complained of.

To this complaint the defendant answered, admitting that the plaintiff was on the 15th day of September, 1911, and for a long time prior thereto, in the employ of the defendant in the City of Seattle, but otherwise he denies the allegation contained in the plaintiff's complaint.

The defendant, in its answer, pleads affirmatively that the reasonable peril attending the work in which the plaintiff was engaged at the time of the happening of the accident described in the complaint was open and apparent and well known by the plaintiff and assumed by him.

This is in substance set out in the first affirmative

defense contained in the answer. A second affirmative defense is set forth in the answer, which in substance is to the effect that the injuries, if any, received by the plaintiff, were caused and contributed to by his own carelessness and negligent acts, and by the careless and **[114—93]** negligent acts of his fellow-servants.

To this answer the plaintiff has filed a reply denying all of the allegations and averments in both the first and second affirmative defenses.

This is a brief statement of the case, and you will be permitted to take the complaint, answer and reply with you to the jury-room, for the purpose of ascertaining what the issues in this case are.

These pleadings you are not to consider as evidence in the case, but are to examine only for the purpose of determining the issues between the parties, as defined to you in the light of these instructions. You are instructed that before the plaintiff will be entitled to recover in this case, he must prove to your satisfaction by a fair preponderance of the evidence, that the proximate cause of his injuries in question was occasioned through the negligence of the defendant, and in this connection you are instructed that as a matter of law it was the duty of the defendant to furnish appliances free from defects discoverable by the exercise of ordinary care; that the defendant owed a duty to the plaintiff to exercise reasonable care and skill, not only in furnishing safe appliances, but in keeping them in a safe condition, and that this is not a duty that could be delegated by the defendant, to the fellow-

servants of the plaintiff. But if you find that the defendant undertook to delegate such duties to the fellow-servants of the plaintiff, you are instructed that this will not excuse the defendant for any default, if you find such there was, in the furnishing of safe appliances and in keeping them in a safe [115—94] condition, which might arise from the negligence of those to whom the duty had been delegated. The defendant is not an insurer of the safety of appliances furnished, but is only held to the exercise of ordinary care in seeing to it that the appliances furnished are free from defects that might be discoverable by the exercise of ordinary care.

Negligence is the omission to do something that a reasonably prudent man, guided by those considerations that ordinarily regulate the conduct of human affairs, would do, or doing something that a prudent or reasonable man would not do under all the circumstances of the particular transaction.

I instruct you that negligence is never presumed, and the mere fact that one is injured while in the employ of another raises no presumption of negligence on the part of the employer. If you shall determine that the plaintiff has, by a fair preponderance of the evidence, established the fact that the injuries complained of were the proximate cause of the defendant's negligence, in failing to furnish safe appliances, being a ladder in this case, or through the failure of the defendant after furnishing it, to properly inspect and keep the same in repair, it will then be your duty, before you can find

for the plaintiff, to determine whether or not the defendant has established by a fair preponderance of the evidence, the allegations of its affirmative answers, as to the assumption of risk, or contributory negligence of the plaintiff.

If you find from the evidence that the defendant has **[116—95]** established by a fair preponderance, that the danger of using the rung of the ladder in question was so obvious, that no ordinarily prudent person would have used the same in the manner the plaintiff used it, then it will be your duty to find that the plaintiff assumed the risk of the ordinary dangers in so using the same, and those risks and dangers which are known, or are so plainly observable that the plaintiff may be presumed to have known them, and that if he continues in the defendant's employ without objection, after such knowledge, he took upon himself the risk of injury from such defects and cannot recover in this action. That is what is known as the doctrine of assumption of risk. And further, if the defendant has established by a fair preponderance of the evidence, that under all the facts and circumstances in this case, the plaintiff failed to use those precautions for his own safety which ordinary prudence, under the circumstances, would require, he was guilty of contributory negligence, and cannot recover.

The burden of proof in this case is upon the plaintiff to establish all the material allegations of his complaint by a fair preponderance of the evidence, and the burden of proof is on the defendant to establish all the material allegations of one or the

other, of their first and second affirmative defenses. If the defendant establishes by a fair preponderance of the evidence, to your satisfaction, that the plaintiff, under the circumstances, assumed the risk, or in like manner that he was guilty of contributory negligence, you should find for the defendant. **[117—96]**

You are instructed that the preponderance of the evidence is not alone determined by the number of witnesses testifying to any particular fact in the case, but the testimony of the greatest convincing power, the testimony which has the most convincing power with you, whether one or many witnesses testify to such fact, and in determining where the preponderance of the evidence is in this case, you should take into consideration the demeanor of the witnesses upon the witness-stand, the opportunity of the witnesses for knowing about the things concerning which they have testified; the probability of the stories of the several witnesses; the interest or lack of interest of the several witnesses who have testified before you, and taking in connection with all these, the circumstances as detailed by the witnesses upon the witness-stand in the trial of this case, and from all these determine where the preponderance of the evidence is, or in other words where the greater weight of the testimony lies, or the truth lies in this case, and when you have determined that, you will have determined where the preponderance of the evidence is. And if you should find it is equally balanced, that is, it does not

preponderate one way or the other, you shall find against the party upon whom the burden of proof upon that issue lies.

If you should find for the plaintiff, you will fix his damages in such sum as will compensate him for the injuries he has received, for the loss of his earning power, past and future, and the sum that the same has been reduced, if you find that it has been reduced by reason of such injuries, together with such sum as you may determine that he is entitled to, by reason of pain and suffering, [118—97] and also such sums as the evidence satisfies you he has paid or will hereafter be compelled to pay for medicine and treatment of his injuries.

You should not award any sum as penalty or punishment of the defendant, but it should be your endeavor to make the plaintiff as nearly whole as may be under all of the circumstances in this case, so as to compensate him in money for the loss, if any, he has sustained, and will in the future sustain by reason of the injury in question, in no case exceeding the sum mentioned in the complaint.

You are instructed that the sum mentioned in the complaint is not a criterion of the amount that you are to award, but only a limit beyond which you cannot go.

You will consider this case in a dispassionate manner, without sympathy or prejudice for one side or the other, and as twelve honest men determine this case between these two litigants the same as if they were individuals, and the same as you would want twelve men to pass upon the matter if you were one

of the interested parties.

You are instructed that you are the sole and exclusive judges of the facts in this case, and you must determine what the facts are, but the law you must take from the court.

You will disregard anything counsel may have said to you in their argument on the facts in this case, or upon any matter addressed to the court, except in so far as their statements may be sustained by the testimony in this case. **[119—98]**

You are the sole and exclusive judges of the credibility of the witnesses who testified before you. In determining the weight or credit you desire to attach to the testimony of any witness, you will have the right to take into consideration, and it is your duty to do so, the demeanor of the witnesses upon the witness-stand; their opportunity of knowing about the things which they have testified; their interest or lack of interest in this case; the reasonableness of the stories of the several witnesses who have testified before you; their demeanor and manner of testifying, and from all this determine where the truth of the case lies.

In determining the weight or credit you desire to attach to the testimony of any witness, you should apply the same test as you would to any person in the ordinary affairs of life, whose truth or falsity is to be considered by you. Harmonize the testimony of all the witnesses who have testified before you, if this can be done in theory, consistent with the truth, you must do so,—but if you find any witness has willfully testified falsely concerning any material matter or

fact in this case, you have the right to disregard his entire testimony, except in so far as you may find it corroborated by other credible witnesses and circumstances detailed and developed upon the trial.

If you find under these instructions for the plaintiff, this will be your form of verdict:

"*In the District Court of the United States for the Western District of Washington.*

No. 2025.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE & TELEGRAPH CO.,

Defendant.

[120—99]

Verdict.

We, the Jury, in the above-entitled case, do find for the plaintiff and assess his damage at $————. You will insert in the blank space the number of dollars you find for the plaintiff, and cause the verdict to be signed at the bottom by your foreman."

If, under these instructions you find for the defendant, this will be your form of verdict:

"The same title and court: We the Jury in the above-entitled case, do find for the defendant," and you would cause that to be signed by your foreman, if that is your verdict.

Twelve of your number must agree on a verdict in this case, and when you have agreed upon a ver-

dict, you will have your foreman sign it and report to the court. Upon your retirement you will appoint one of your number foreman.

As stated, the pleadings in this case will be sent to the jury-room. You are not to consider them as evidence in the case. The instructions of the Court are the law in the case. The exhibits will also be sent to the jury-room, and these you should consider in connection with the evidence in this case.

[Withdrawal of Any Claim on Account of Medical Attention, etc.]

Mr. BALLINGER.—I observe the Court instructed the jury in case they find for the plaintiff, they might consider, in making up the award, any sums necessarily expended for medical attention, and I rise now to withdraw any claim on account of medical attention or medicines or hospital [121—100] fees.

By the COURT.—Gentlemen of the Jury, there was no testimony offered in this case as to any moneys expended for medicine or hospital fees, of any that would be hereafter expended for medicine or hospital fees, and in arriving at the amount of your verdict, if you should find for the plaintiff, you will not allow any items, or take into consideration any amounts for this purpose, doctor's bills or medicine.

Jury retired.

And thereupon the defendant excepted to the instructions of the Court as follows:

[Exceptions to Instructions Given and Refused.]

We except to the refusal of the Court to give to the

jury defendant's requested instruction No. 2, we except to the refusal of the Court to give to the jury defendant's requested instruction No. 3; we except to the refusal of the Court to give defendant's requested instruction No. 4, and likewise we except to the refusal of the Court to give to the jury defendant's requested instruction No. 5.

The defendant desires to except to so much of the Court's instructions as told the jury that the duty devolved on the master in this case to furnish safe appliances, for the reason that under the evidence in this case, it is an admitted fact that the appliance which caused the injury was not furnished, or attempted to be furnished by the master.

By the COURT.—The exception will be allowed. [122—101]

[Order Settling Bill of Exceptions.]

The foregoing entitled cause coming on regularly for hearing before the Court on this 31st day of December, 1912, the time duly designated by the Court for settling and certifying bill of exceptions therein, the plaintiff and defendant now appearing by their respective attorneys of record herein, and the said defendant having within the time extended by stipulation and order of the Court herein for that purpose, duly proposed the foregoing as a bill of exceptions in said action, and no amendments thereto having been proposed by the plaintiff, and the parties now agreeing to the settlement of the foregoing as the bill of exceptions in this action,—

Now, it is by the Court and the Judge of said Court presiding at the trial of said cause ORDERED and

CERTIFIED that the foregoing be and the same hereby is settled as the true bill of exceptions in said cause, and that said bill of exceptions, together with Plaintiff's Exhibit One, includes all the material facts and evidence herein, and is correct in all respects and is hereby approved, allowed and settled and made a part of the record herein, and the same being so settled and certified, it is hereby ordered to be filed herein by the clerk.

CLINTON W. HOWARD,
Judge.

[Indorsed]: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Dec. 31, 1912. Frank L. Crosby, Clerk. By E. M. L., Deputy Clerk. [123]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Now, on this 2d day of January, 1913, comes the defendant by its attorneys, Messrs. Hughes, McMicken, Dovell & Ramsey, and says: That the judg-

ment entered in the above cause on the 19th day of October, 1912, is erroneous and unjust—

First: Because it adjudges that the said plaintiff shall recover the sum of Eight Thousand Dollars ($8,000) against the said defendant.

Second: Because it adjudges that the said plaintiff shall recover of and from the defendant any sum.

Third: Because the evidence was insufficient to support or justify the verdict rendered in said cause on the 10th day of October, 1912, and upon which verdict said judgment is based.

Fourth: Because the evidence upon the trial of said cause was insufficient to establish any negligence on the part of this defendant.

Fifth: Because the evidence upon the trial of said [124] cause shows that the ladder, the defective condition of which it is claimed caused the accident, was not furnished by the defendant, as is alleged in the complaint, or at all, but upon the contrary was secured by the plaintiff and his fellow-servants.

Sixth: Because the evidence upon the said trial was insufficient to establish that there was any latent or hidden defect in said ladder, or any defect which the plaintiff by the exercise of ordinary care would not have observed and understood.

Seventh: Because the Court erred in not holding as a matter of law that the plaintiff was guilty of contributory negligence.

Eighth: Because the Court erred in not holding

as a matter of law that the plaintiff assumed any risk or peril attending the use of the appliance which caused the injury.

Ninth: Because the Court erred in refusing to grant the motion of the defendant for a nonsuit and direct a verdict at the close of plaintiff's evidence.

Tenth: Because the Court erred in refusing to sustain the challenge of the defendant to the sufficiency of the evidence and to grant a motion for a directed verdict at the close of all the evidence.

WHEREFORE, the defendant prays that said judgment be reversed and the District Court directed to dismiss said action as prayed in the answer herein.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant.

Copy of above assignment of error received, and due service of same acknowledged this 3d day of January, 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff. [125]

[Endorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy. [126]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

Petition for Order Allowing Writ of Error.

The said defendant, The Pacific Telephone and Telegraph Company, a corporation, feeling itself aggrieved by the judgment entered in said cause on the 19th day of October, 1912, in favor of said plaintiff and against said defendant for the sum of Eight Thousand ($8,000) Dollars, and said plaintiff's costs and disbursements, in which judgment, and the proceedings leading up to the same, certain errors were committed to the prejudice of said defendant, which more fully appear from the assignment of errors which is filed herewith, comes now and prays said Court for an order allowing the said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors complained of, under and according to the laws of the United States in that behalf made and provided, and also prays that an order be made fixing the amount of security which the said defendant shall give upon said writ of error, and that upon the furnishing of said security all fur-

ther proceedings in this cause be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals for the Ninth Circuit. And further prays [127] that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and your petitioner will ever pray.

Dated this 3rd day of January, A. D. 1913.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Defendant.

Copy of within Petition for Order Allowing Writ of Error received, and due service of same acknowledged this 3d day of January, A. D. 1913.

REYNOLDS, BALLINGER & HUTSON,

Attorneys for Plaintiff.

[Endorsed]: Petition for Order Allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington. Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [128]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on this day to be heard in the courtroom of said court in the City of Seattle, Washington, upon the petition of the defendant, The Pacific Telephone and Telegraph Company, a corporation, herein filed, praying the allowance of a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also herein filed, in due time, and also praying that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

The Court having duly considered the same does hereby allow the said writ of error prayed for, and it is ORDERED that upon the giving by said defendant, The Pacific Telephone and Telegraph Company, a corporation, of a bond according to law, in the sum of Ten Thousand ($10,000.00) Dollars, the same shall operate as a supersedeas bond and all proceedings be [129] stayed, pending the determination of said writ of error.

Dated this 3d day of January, A. D. 1913.

CLINTON W. HOWARD,
Judge.

Copy of foregoing order received and service of same acknowledged this 3d day of January, A. D. 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

[Indorsed]: Order Granting Writ of Error and Fixing Amount of Bond. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [130]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,
Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,
Defendant.

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, The Pacific Telephone and Telegraph Company, a corporation, the above-named defendant, as principal, and National Surety Company, a body corporate, duly incorporated under the Laws of the State of New York and authorized to transact the business of surety in the State of Washington, as

surety, are held and firmly bound unto Frank Starr, the above-named plaintiff, in the sum of Ten Thousand Dollars to be paid to said plaintiff, his executors, administrators and assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 3d day of January, 1913.

The condition of the above obligation is such that whereas in the above court and cause, final judgment was [131] rendered against the said defendant and in favor of said plaintiff, in the sum of Eight Thousand Dollars ($8,000), with plaintiff's costs and disbursements; and

WHEREAS, the said defendant has obtained from said Court a writ of error to reverse the judgment in said action, and a citation directed to the plaintiff is about to be issued citing and admonishing him to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, to be held at San Francisco, in the State of California:

NOW, THEREFORE, if the said defendant, The Pacific Telephone and Telegraph Company, a corporation, shall prosecute the said writ of error to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void, otherwise

to remain in full force and effect.

THE PACIFIC TELEPHONE AND TELEGRAPH CO. [Seal]

By F. L. McNALLY,
Its Agent.

By HUGHES, McMICKEN, DOVELL & RAMSEY,
Its Attorneys.

NATIONAL SURETY COMPANY.

[Seal of National Surety Company]

By GEO. W. ALLEN,
Atty. in Fact.

The sufficiency of the surety on the foregoing bond approved by me this 3d day of January, 1913.

CLINTON W. HOWARD,
Judge of said Court. [132]

Copy of within Supersedeas Bond received, and due service of same acknowledged this 3d day of January, 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plantiff.

[Indorsed]: Supersedeas Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [133]

Writ of Error [Copy].

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between Frank Starr, plaintiff, and The Pacific Telephone and Telegraph Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said The Pacific Telephone and Telegraph Company, a corporation, defendant, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the first day of February, 1913, that the record and proceedings aforesaid being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done. [134]

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 3d day of Jan., in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal] FRANK L. CROSBY,
Clerk of said District Court of the United States, for the Western District of Washington.

The foregoing writ is hereby allowed.

CLINTON W. HOWARD,
United States District Judge, for the Western District of Washington.

Copy of within Writ of Error received, and due service of same acknowledged this 3d day of January, 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

[Indorsed]: Original. No. 2052. In the United States District Court, Western District of Washington, Northern Division. Frank Starr, Plaintiff, vs. The Pacific Telephone and Telegraph Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. Hughes, McMicken, Dovell & Ramsey, Attorneys for Defendant. 661–670 Colman Building, Seattle, Wash. **[135]**

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

Citation [on Writ of Error (Copy)].

United States of America,—ss.

To Frank Starr, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the City of San Francisco, State of California, on the first day of February, 1913, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein The Pacific Telephone and Telegraph Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be

done to the parties in that behalf.

Dated the 3d day of January, 1913.

(Signed) CLINTON W. HOWARD,
United States District Judge for the Western District of Washington. **[136]**

[Seal] Attest: FRANK L. CROSBY,
Clerk of said United States District Court for the Western District of Washington.

By .....,
Deputy.

We hereby, this 3d day of January, 1913, acknowledge service of the foregoing Citation at the City of Seattle, Washington.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for said Frank Starr.

Received copy of the foregoing Citation lodged with me for defendant in error this 3d day of January, 1913.

[Seal] FRANK L. CROSBY,
Clerk of said United States District Court. **[137]**

[Endorsed]: Copy. No. 2052. In the United States District Court, Western District of Washington, Northern Division. Frank Starr, Plaintiff, vs. The Pacific Telephone and Telegraph Company, a Corporation, Defendant. Citation on Appeal (Lodged Copy). Filed in the U. S. District Court, Western Dist. of Washington. Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. **[138]**

In the United States District Court for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

Stipulation Relative to Exhibit.

It is hereby stipulated between the parties hereto that the clerk of this court in making up his return to the writ of error herein shall include therein and transmit therewith as a part of the record the original ladder introduced in evidence herein as Plaintiff's Exhibit No. 1.

Dated January 6th, 1913.

REYNOLDS, BALLINGER & HUTSON,

Attorneys for Plaintiff.

HUGHES, McMICKEN, DOVELL & RAMSEY,

Attorneys for Defendant.

[Indorsed]: Stipulation Relative to Exhibit. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 6, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [139]

In the United States District Court for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

Order for Sending Up Original Exhibit.

Agreeably to the written stipulation of the parties this day filed herein, and it being in the opinion of the presiding Judge undersigned deemed proper that the clerk of this court in making up his return to the writ of error herein shall include therein and transmit therewith as a part of the record the original ladder introduced in evidence herein as plaintiff's exhibit No. 1;

It is now by the undersigned presiding Judge of said court ordered that said original exhibit be sent up by the clerk of this court as a part of his return to the writ of error herein to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 6th day of January, 1913.

CLINTON W. HOWARD,
United States District Judge. **[140]**

[Indorsed]: Order for Sending up Original Exhibit. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 6, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. **[141]**

In the United States District Court for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

Stipulation as to Record.

It is hereby stipulated between the parties hereto that the clerk of this court in making up his return to the writ of error herein shall include therein the following:

Complaint included in transcript of record filed November 7, 1911, on removal from the Superior Court of Washington for King County;

Order of removal included in transcript of record on removal filed herein November 7, 1911;

Answer;

Reply;

Original exhibit specified in stipulation between the parties dated January 6th, 1913;

Verdict;

Memorandum of costs and disbursements;

Judgment;

Motion for new trial;

Order overruling motion for new trial; **[142]**

Bill of exceptions;

Assignment of errors;

Petition for order allowing writ of error;

Order granting writ of error and fixing amount of bond;

Supersedeas bond;

Writ of error;

Original citation and acceptance of service thereon;

Copy of citation lodged with clerk for defendant in error;

Stipulation and order respecting exhibit;

Stipulation as to record;

which comprise all the papers, exhibits, depositions and other proceedings which are necessary to the hearing of said cause upon such writ of error in the United States Circuit Court of Appeals, and that no other papers or proceedings than those above mentioned need be included by the clerk of said court in making up his return to said writ of error as a part of such record.

Dated January 6th, 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff.

HUGHES, McMICKEN, DOVELL & RAMSEY,
Attorneys for Defendant.

[Indorsed]: Stipulation as to Record. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 6, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [143]

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the United States District Court for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

United States of America,
Western District of Washington,—ss.

I, F. L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the 151 typewritten pages, numbered from 1 to 151, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, depositions and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause on writ of error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same, together with the original of Plaintiff's Exhibit 1, which said original exhibit is transmitted herewith pursuant to the order of Court so directing, constitute the record on return to said writ of error herein from the judg-

ment of said United States District Court for the Western [144] District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing transcript is the sum of Sixty-six and 77/100 ($66.77) Dollars, and that the said sum has been paid to me by Hughes, McMicken, Dovell & Ramsey, attorneys for defendant.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said district, this 22d day of January, 1913.

[Seal] FRANK L. CROSBY,
Clerk. [145]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 2052.

FRANK STARR,

Plaintiff,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Defendant.

Citation [on Writ of Error (Original)].

United States of America,—ss.

To Frank Starr, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in the city of San Francisco, State of California, on the first day of February, 1913, pursuant to a writ of error filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Northern Division, wherein The Pacific Telephone and Telegraph Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated the 3d day of January, 1913.

CLINTON W. HOWARD,

United States District Judge for the Western District of Washington. **[146]**

[Seal] Attest: FRANK L. CROSBY,

Clerk of said United States District Court for the Western District of Washington.

By .....,

Deputy.

We hereby, this 3d day of January, 1913, acknowledge service of the foregoing citation at the city of Seattle, Washington.

REYNOLDS, BALLINGER & HUTSON,

Attorneys for said Frank Starr.

Received copy of the foregoing citation lodged with me for defendant in error this 3d day of January, 1913.

[Seal] FRANK L. CROSBY,
Clerk of said United States District Court. [147]

[Endorsed]: Original. No. 2052. In the United States District Court, Western District of Washington, Northern Division. Frank Starr, Plaintiff, vs. The Pacific Telephone and Telegraph Company, a Corporation, Defendant. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy. [148]

Writ of Error [Original].

United States of America,—ss.

The President of the United States of America to the Judges of the District Court of the United States for the Western District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, or some of you, between Frank Starr, plaintiff, and The Pacific Telephone and Telegraph Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said The Pacific Telephone and Telegraph Company, a corporation, defendant, as is said and appears by the complaint, we being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the party afore-

said, in this behalf, do command you, if any judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justice of the United States Circuit Court of Appeals for the Ninth Circuit, at the court-rooms of said court in the city of San Francisco, in the State of California, together with this writ, so that you have the same at the said place before the justice aforesaid, on the first day of February, 1913, that the record and proceedings aforesaid being inspected, the said justice of the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done. [149]

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this third day of January, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal] FRANK L. CROSBY,
Clerk of said District Court of the United States, for the Western District of Washington.

The foregoing writ is hereby allowed.

CLINTON W. HOWARD,
United States District Judge for the Western District of Washington. [150]

Copy of within Writ of Error received, and due service of same acknowledged this 3d day of January, 1913.

REYNOLDS, BALLINGER & HUTSON,
Attorneys for Plaintiff. **[151]**

[Endorsed]: Original. No. 2052. In the United States District Court, Western District of Washington, Northern Division. Frank Starr, Plaintiff, vs. The Pacific Telephone and Telegraph Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Jan. 3, 1913. Frank L. Crosby, Clerk. By E. M. L., Deputy.

[Endorsed]: No. 2242. United States Circuit Court of Appeals for the Ninth Circuit. The Pacific Telephone and Telegraph Company, a Corporation, Plaintiff in Error, vs. Frank Starr, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed January 25, 1913.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Plaintiff in Error,* vs. FRANK STARR, *Defendant in Error.*	No.....

Upon Writ of Error to the United States District Court for the Eastern District of Washington, Northern Division.

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF CASE

This action, brought to recover damages for a personal injury, was predicated upon the charge in the complaint that Frank Starr, then and there being in the employ of The Pacific Telephone and Telegraph Company as an installer, was injured by the breaking of a ladder upon which he was standing

while attempting to fasten a cable to the wall of a building upon Post Street in the City of Seattle. He alleged in his complaint as the gist thereof, as follows:

"That on September 15, 1911, the gang, of which plaintiff was a member, under the direction of said foreman, was engaged in putting up a cable on the wall of a building abutting on Post Street, in the City of Seattle, between Pike and Union streets, in said city; *that certain ladders had been furnished for said gang of men by the defendant for their use and plaintiff had nothing to do with the furnishing of said ladders;* that said cable was being fastened to said wall at a height of approximately 25 or 30 above the surface of said Post Street, and said ladders being separately too short to reach to said point, the same, by the direction of said foreman, were spliced together and plaintiff, in the discharge of the duties of his employment, went upon said ladders to fasten said cable; that because of the shortness of said ladders it was necessary for plaintiff to take his position and he did take his position upon the top rung of the uppermost of said ladders; that the topmost of said ladders was defective in this, that the top rung thereof was cross grained so that the same was weak and unfit for use, the same being too weak to hold the weight of a man standing upon it; that defendant and said foreman, by a reasonable inspection of said ladder, could have ascertained the condition of said rung, and it would have been apparent upon said inspection that the same was dangerous and unfit for use and would be likely to break if anyone took up a position on said rung, but neither said foreman nor other agent of defendant made such inspection; and that plaintiff did not know said rung was defective, weak or insufficient and was not warned thereof, and supposed that the rung was sufficient for his use in the performance of his work. That when plaintiff in the performance of his duties as aforesaid went upon

said ladder and stood upon said rung, as his duties required him to do, the same broke, and plaintiff therefrom fell a distance of about 20 feet to the surface of said Post Street which was paved, and thereby received the injuries hereinafter set forth; that said accident was wholly due to the negligence of defendant in furnishing to plaintiff for use in the performance of his duties, said unsafe ladder and in failing to inspect the same, and in failing to warn him of his danger in using the same, and was not due to any carelessness or negligence on the part of plaintiff." (Record p. 3.) (Italics ours.)

The trial resulted in a verdict and judgment in favor of Starr in the sum of $8,000, and it is this judgment we seek to have reversed. There was little, if any, conflict in the testimony, and we state the salient points thereof with confidence that there will be no issue between opposing counsel and ourselves as to the facts.

Frank Starr was at the time of the accident about 25 years of age, was an electrician and a journeyman installer. He had been in the employ of the defendant company for four years, working steadily. (Record p. 82.)

The occupation of installer requires that work be done in attaching wires to poles and buildings, in which work the use of ladders is constantly required. The plaintiff at the time of the happening of the accident and for some days prior thereto had been with six other men engaged in fastening a cable to the rear of a building upon Post Street at a height of about 20 feet. It appears to have been the custom of the company to permit the installers to secure

their own ladders provided they did not have sufficient upon the ground to do the work.

The plaintiff testified:

"Q Did they (the company) always supply a sufficient number?

A No, sir.

Q On the occasions when the men had an insufficient supply of ladders, what, if anything, would the foreman do?

A He would tell us to rustle." (Record p. 84.)

McCartney, a witness for the plaintiff, said:

"Q Now, when, as you say, the company failed to supply a sufficient number of ladders, how were they procured?

A Well, they used to have to rustle around the alleys and get them.

Q By whose orders would they do that?

A By the foreman, if he was there, and if he wasn't there, we would take that on our own responsibility, because we had to have them—" (Record p. 39.)

Filer, one of the witneses, said:

"Q Was it uncommon for the men working as you were working to have to—as one of the witnesses expressed it—rustle ladders?

A It was not uncommon. It wasn't particularly common.

Q It was not uncommon?

A No.

Q Were you directed by the foreman to rustle ladders from time to time?

A I don't know that. I couldn't say I was particularly directed, but if we were short of ladders at a particular time, why, it was understood that we would go ahead with the work just the same, that

would mean we would have to get them." (Record p. 101.)

The other witnesses quite agreed with this testimony—that when a ladder was lacking the installers procured it for themselves.

The day before the accident happened McCartney and Filer, two men engaged in the same work as the plaintiff and consequently fellow-servants, had gone to some place in the neighborhood and secured two pieces of ladder, one about 12 feet long and the other about 7 feet long. Filer secured the shorter ladder and used it for a short time upon which to stand while he was putting up a terminal box at a height of about 6 feet. After a short experience he discarded his short ladder, testifying as a reason therefor as follows:

"Q Then, did you discard it?
A For the next box I did.
Q Why?
A Because it was sufficiently long, that is sufficiently long enough, and I questioned its safety.
Q Why did you question its safety?
A It looked rather frail.
Q And what did you do for a ladder?
A I made up another one." (Record p. 102.)

After Filer had discarded this short ladder, for the reason just stated, and late in the afternoon upon the day before the accident McCartney and the plaintiff, who were working together, desired a longer ladder than was available. One Smith, who was a foreman for the company and who at that time had under his supervision several pieces of work in dif-

ferent parts of the city (Record p. 32) happened at the place where the plaintiff was working. Some one told Smith that a longer ladder than was at hand was required. He directed whomever asked him to splice together some of their short pieces, there being five short pieces of ladder at the place. (Record p. 33.) The plaintiff and McCartney thereupon proceeded to splice the two pieces of ladder, the shorter one of which was the 6-foot piece which Filer had secured and discarded as aforesaid (Record p. 102), and in this way the ladder was made up, which has been caused to be introduced as an exhibit in this case and which will be before this court. McCartney and the plaintiff were some half hour in splicing the ladder (Record p. 93) and did not make use of it until the next morning, when the plaintiff going to work at 8 o'clock placed the spliced ladder against the wall and worked upon it for about an hour and a half, when he ascended so as to stand upon the second round from the top of the upper portion of the ladder, holding in his hand a portion of a heavy cable which added greatly to his weight. The rung upon which he was standing broke underneath him, precipitating him to the stone pavement, resulting in the injury complained of. Inasmuch as the ladder itself will be before this court as it was before the lower court, a description of it is not necessary. It is claimed that it was defective because the rung which broke was cross-grained; and upon the trial plaintiff predicated his claim of negligence upon the contention that the grain of the rung presented

a defect which the foreman, Mr. Smith, should have discovered but of which he was not aware. The plaintiff, however, said:

"Q Mr. Smith was your foreman?
A Yes, sir.
Q He couldn't have told it was cross-grained by looking at it before, could he?
A Not by just glancing at it, no, sir.
Q He couldn't have told by looking at it closer, could he?
A If he had got right down close and been looking for a cross-grain he would have found it, yes.
Q Now, explain that, you think he could have told—you think Smith could have told so as to have kept you off the ladder if he had gotten down close to it and looked at it closer?
A He could; yes. The same as one of those others were cross-grained, and he didn't know it." (Record p. 93.)

McMellon, a witness for plaintiff, testified:

"Q Now, how close an inspection would it have required to see that this rung which broke was cross-grained?
A Well, I imagine it would have taken a careful examination of it before the accident.
Q How do you mean, how careful?
A Well, if a man got right down and probably examined the wood real carefully and close he could have noticed it.
Q Suppose Smith had examined it to determine whether it was cross-grained or not, what would he have had to have done, would he have had to scrape the timber?
A I think not.
Q He wouldn't had to have done that?
A No.
Q Would he have had to use a magnifying glass?

A I wouldn't judge he would have.
Q You mean to say Smith could have seen it with his naked eye if he had just taken the ladder in his hand and looked at it?
A I think he could, yes, if he had looked at it closely.
Q How long would it have taken him to do that?
A I shouldn't judge it would have taken very long.
Q Could he have done it in an instant?
A No, I think no.
Q He wouldn't have had to cut into the grain or anything of that kind?
A It wouldn't have taken him very long to examine the one rung.
Q He wouldn't have had to scrape the timber or cut into it at all?
A I think not. I don't know. He might have." (Record pp. 64-65.)

It is undisputed that neither portion of the ladder from which plaintiff fell was furnished by the company, the plaintiff testifying as follows:

"Q In other words, the company did not furnish either one of those pieces?
A No.
Q Filer and McCartney, two men who were working in the same capacity you were, were they—
A Yes, sir.
Q Went and got them somewhere?
A Yes, sir." (Record p. 95.)

SPECIFICATION OF ERRORS

The following errors are specified:

First: That the said court adjudged that the plaintiff should recover the sum of $8,000 against the said defendant.

Second: The court erred in adjudging that the said plaintiff should recover of and from the defendant any sum at all.

Third: The court erred in denying the challenge of the defendant to the sufficiency of the testimony.

Fourth: The court erred in overruling the motion of the defendant to enter judgment for the said defendant.

Fifth: The court erred in overruling the motion of the defendant to direct a verdict for said defendant.

Sixth: The court erred in not holding as a matter of law that the plaintiff was guilty of contributory negligence.

Seventh: The court erred in not holding as a matter of law that the plaintiff assumed any risk or peril attending the use of appliance which caused the injury.

Eighth: The court erred in overruling the motion of the defendant for a new trial.

Ninth: The court erred in rendering the judgment in favor of said plaintiff and against said defendant and in rendering any judgment in favor of said plaintiff and against said defendant.

ARGUMENT

It will be observed from our specifications of error that the sole question intended to be presented

is whether or not the plaintiff below is entitled as a matter of law to not recover in this action. We contend that the case should have been withdrawn from the jury and judgment entered for the defendant and for the following reasons:

The rule which imposes liability upon an employer who furnishes unsafe appliances has no application here because the company did not furnish the appliance but the same was selected by the plaintiff and his fellow-servants.

As before stated, the two pieces of ladder were secured by McCartney and Filer. These men, as well as Smith, the so-called foreman, were fellow-servants of the plaintiff below.

Baltimore & Ohio Railroad Company v. Baugh, 149 U. S. 368.

American Bridge Co. v. Seeds (C. C. A., Eight Circuit), 144 Fed. 605; and see authorities therein cited.

Ryan et al. v. Smith et al. (C. C. A., Ninth Circuit), 85 Fed. 758.

Armour v. Hahn, 111 U. S. 313.

Whatever may be said as to the propriety of the custom, it was agreed by all the witnesses that it was the general rule that when ladders were not at hand the installers should go out and procure them for themselves wherever they could. The plaintiff below accepted and remained in his employment for four years with knowledge of this rule and under this arrangement and he, therefore, assumed any risk

which might attend the inability of himself or fellow-servants to secure the proper kind of ladder.

The distinction is well recognized between those cases where the master undertakes to furnish the appliances and those where the servants secure them for themselves. It is stated in *Shearman & Redfield on Negligence* (Fifth Edition) §195, as follows:

"An important distinction is taken between instrumentalities which the master undertakes to furnish for the servants' use and those which he employs the servants to furnish for themselves and their fellow-servants in the same work. Negligence in making the former is the master's negligence, but negligence about the latter is the negligence of a fellow-servant."

We find the rule illustrated in a large number of cases known as the "scaffold cases," where the principle is familiar, that if the master places his servant to work upon a scaffold which the master has left unsafe there is a liability, but if upon the other hand the master has permitted a servant and his fellows to construct their scaffolding for themselves there is no liability. It is submitted that the principle underlying this line of cases is directly analogous to the principle which must control the case at bar. It was a part of the implied contract under which the plaintiff below had been working for four years, that in the event sufficient ladders were not at hand he and his fellows would borrow or manufacture a ladder for themselves; and in this particular instance two of plaintiff's fellow-servants secured the pieces

which plaintiff and a co-servant manufactured into one ladder by splicing them together.

In *Burns v. Sennett* (Cal.) 33 Pac. 918, the rule is well stated as follows:

"While the general rule is as above stated, still it is well established that the rule does not apply to a case where several persons are employed to do certain work, and by the contract of employment, either express or implied, the employes are to adjust the appliances by which the work is to be done. For instance, if several men are employed to paint a building, or to do some work upon it which requires scaffolding, or some other temporary structure or appliance to support the workmen, the employer to furnish the materials and the employed to construct or adjust the scaffolding or other appliance, the employer is not liable to one of the employes for the careless act of another employe done in the construction, adjustment, or maintenance of the structure or appliance."

Discrepancies have arisen in the decisions of various courts, and many grotesque announcements have been made because of the failure to properly distinguish whether an employe, through whose negligence in the selection of appliances an injury happens, is acting for the master or for himself and those engaged in the common employment.

One class of cases is those where the master, assuming the duty to furnish safe appliances, delegates that duty to a servant who negligently performs it. In such class of cases there is a liability upon the master; but an entirely different class of cases is those where the servant undertakes as an incident

of his employment to furnish, make or repair, either alone or by cooperation with his fellows, the tools and appliances which he uses. In this class of cases there is no liability, and it is to this latter class the present case belongs, because the master did not undertake to furnish ladders but required the plaintiff below and those working with him to secure their own ladders, as an incident of their work.

The distinction above referred to is well stated by the New Jersey court in *Ingebregtsen v. Nord Deutscher Lloyd Steamship Co.,* 31 Atl. 619, as follows:

"On this topic a rational distinction would seem to be that, when the employe's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow-servant, and the master is not responsible to his fellow-servant for his fault, but that, if the master has cast a duty of inspection or repair upon an employe who is not engaged in using the apparatus in a common employment with his fellow-servant, then that employe, in that duty, represents the master, and the master is chargeable with his default. This distinction is noticeable in *McAndrews v. Burns,* 39 N. J. Law 117; *Smith v. Iron Co.,* 42 N. J. Law 467; *Collyer v. Railroad Co.,* 49 N.J. Law 59, 69, 6 Atl.437; *Ross v. Walker* (Pa. Sup.) 21 Atl. 157; *Moynihan v. Hills Co.,* 146 Mass. 586, 16 N. E. 574; *Daley v. Railroad Co.,* 147 Mass. 101, 16 N. E. 690, and many other cases."

The rule as to scaffolding and platforms which is generally accepted, and we believe not departed from by respectable authority, is stated in *Shearman &*

Redfield on Negligence (Fifth Edition), §195, as follows:

"If a servant is engaged to work upon a scaffold or platform, ready made, the master is held responsible for personal care to make it a safe place on which to work. But if a number of associated servants are employed to make the scaffold or *other standing place,* as well as to use it when made, the master is no further responsible for negligence in its making than he is for negligence in work done upon it, when made." (Italics ours.)

We respectfully submit that the analogy of our case to those referred to in the text just quoted requires that it fall under the same rule.

Until we have adopted the rule that compensation by the employer to the employe shall in any case follow an injury, we must recognize the impropriety of permitting a recovery in a case of this character. When a master permits his employe to select his own appliance for use by himself and his fellows and he selects an unsafe appliance, justice, as it has been defined by rules which have heretofore been in vogue and which must govern the determination of the present case, would not seem to require compensation on the part of the master for an injury which was clearly the fault of the servant who made the selection. It may be determined that the general welfare of society requires that compensation be made in all cases of injury regardless of where the fault is located, but until such a rule has been enacted into law we respectfully submit that for the

reason above suggested, if for not other, a recovery may not be permitted in this case.

Under the adjudicated cases recovery is not permitted because of an accident occasioned by the use of as simple an appliance as a ladder.

It is generally held that the rule of employers' liability applicable to complicated and dangerous machinery does not apply to simple implements.

See

McMillan v. Minetto Shade Cloth Co., 117 N. Y. Sup. 1082.

Hart v. Village of Clinton, 100 N. Y. Sup. 1092.

Smith v. Fuel Co., 108 N. Y. Sup. 45.

The case of *Marsh v. Chickering* from the New York Court of Appeals, 5 N. E. 56, is the leading case upon this subject, the controversy there being as to whether or not liability could be imposed upon the master for an accident which happened because of a defective ladder. The court said:

"In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials furnished, the use of which requires the exercise of great skill and care, it can scarcely be claimed that a defective instrument or tool furnished by the master, of which the employe has full knowledge and comprehension, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and

who uses the ordinary tools employed in such work, to which he is accustomed, and in regard to which he has perfect knowledge, can hardly be said to have a claim against his employer for negligence, if, in using a utensil which he knows to be defective, he is accidentally injured. It does not rest with the servant to say that the master has superior knowledge, and has thereby imposed upon him. He fully comprehended that the spade or the hoe or the ladder, or the instrument which he employed was not perfect, and if he was thereby injured it was by reason of his own fault and negligence. The fact that he notified the master of the defect, and asked for another instrument, and the master promised to furnish the same, in such a case, does not render the master responsible if an accident occurs.

"We have referred to no adjudicated case which upholds the liability of a party under circumstances of the same character as those presented by the evidence here. A rule imposing such a liability would be far reaching, and would extend the principle stated to many of the vocations of life for which it was never intended. It is one of a just and salutary character, designed for the benefit of employes engaged in work where machinery and materials are used of which they can have but little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar. The plaintiff was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to."

This has been cited with approval in the following cases from other courts:

American Car & Foundry Co. v. Nachand, 93 N. E. 1083.

Cole v. Spokane Gas & Fuel Co., 119 Pac. 831.

St. Louis & S. F. R. Co. v. Mayne, 127 Pac. 476.

Rahm v. Chicago, R. I. & P. Ry. Co., 108 S. W. 572.

Gulf C. & S. F. R. Co. v. Larkin, 82 S. W. 1026.

Rogers v. Galveston City R. Co., 13 S. W. 541.

Longpre v. Big Blackfoot Milling Co., 99 Pac. 131.

Higgins v. Southern Pac. Co., 72 Pac. 690.

Patnode v. Harter et al., 21 Pac. 679.

Meyer v. Ladewig, 110 N. W. 419.

Mattson v. Minnesota & N. W. R. Co., 108 N. W. 517.

Lynn v. Glucose Sugar Refining Co., 104 N. W. 577.

Wachsmuth v. Shaw Electric Crane Co., 76 N. W. 497.

Corcoran v. Milwaukee Gas-Light Co., 51 N. W. 328.

Tompkins v. Marine Engine & Mach. Co., 58 Atl. 393.

Westinghouse Electric & Mfg. Co. v. Heimlich, 127 Fed. 92.

Gowen v. Harley, 56 Fed. 975.

In the case of *Borden v. Daisy Roller-Mill Co.,* 74 N. W. 91, the Supreme Court of Wisconsin said:

"A ladder is one of the most simple contrivances in general use. The danger attending such use is a matter of almost common knowledge, and is particularly within the knowledge of men engaged in such

work as that in which plaintiff was employed when injured."

This language is quoted with approval in *Sheridan v. Gorham Mfg. Co.* (R. I.), 66 Atl. 576; *Soderburg v. Wells,* 57 Wash. 281; and *Deaton v. Abrams,* 60 Wash. 1.

In the case of *Cahill v. Hilton,* 13 N. E. 339, the Court of Appeals of New York used the following language, the pertinency of which will readily appear when we bear in mind that the plaintiff below in the case at bar had the ladder under his intimate inspection during the half hour it took him to splice it and during the hour and a half while he was working upon it in the morning before his injury:

"The evidence of the defects in the ladder was furnished mainly by the plaintiff's co-servants, and they were evidently aware of the difficulty of the problem their evidence was designed to elucidate, viz., to show that the defects were so apparent that the defendants were chargeable with negligence for not observing them, but that they were also so obscure that the plaintiff, who was in the frequent use of the ladder, was excusable in not seeing them. The plaintiff's means of discovering these defects, if there were any, were quite equal to those of any of his witnesses; but the jury were permitted to find, upon such evidence, that the defendants were chargeable with negligence for not discovering and remedying them, and that the plaintiff, with superior means of observation, was ignorant of their existence. It is difficult to see upon what principle of logic or reason such a verdict can be supported. A ladder, like a spade or hoe, is an implement of simple structure, presenting no complicated question of power, motion, or construction, and intelligible in all of its

parts to the dullest intellect. No reason can be perceived why the plaintiff, brought into daily contact with the tools used by him, as he was, should not be held chargeable, equally with the defendants, with knowledge of their imperfections."

This case is cited with approval in *Cole v. Spokane Gas & Fuel Co.,* 66 Wash. 393-395.

In *McGrath v. Walsh,* 4 N. Y. Sup. 705, the plaintiff was injured by the turning of a rung of the ladder under his feet. He based his claim for damages upon the allegation that the defendant had furnished him a defective ladder. He testified that he had gone up and down the ladder many times before but had never discovered the defect. The court said:

"The effect of this testimony is certainly to establish either that there was no original defect in the ladder discoverable upon inspection, or that, if such defect existed, plaintiff elected to go on working upon it with knowledge thereof. Taking either horn of this dilemma, I think the defendants were entitled to judgment. If there was any patent defect, the rule laid down in *Cahill v. Hilton, supra,* makes it incumbent upon the servant, equally as upon the master, to examine the ladder and discover the same; and failure to make such examination and discovery on the servant's part would therefore be contributory negligence. If, on the other hand, the alleged defect in the construction of the ladder was an occult one, which could not have been discovered by inspection, the master was not guilty of negligence."

In *Henggler v. Cohn,* 52 Atl. 280, the Supreme Court of New Jersey said:

"The cause of the accident was the breaking of a hinge which connected two parts of a ladder together.

Assuming the fact to be, as plaintiff contended, that the hinge was unsafe, and the ladder dangerous on this account, this condition would have been perfectly obvious to the plaintiff upon inspection, unless it was due to a latent defect which the master himself could not have ascertained by an inspection on his part."

In the case of *Jenney Electric Light & Power Co. v. Murphy,* 18 N. E. 30, the court said:

"In the present case, as we have seen, the plaintiff was of mature age, and of average mental capacity. An implement less complicated or more easily comprehended than a 12- or 14-foot ladder can hardly be conceived of; and the consequence of going upon one in the defective condition of that described, unless with extreme caution, must be within the comprehension of every adult person of ordinary intelligence. While it is true that the appellee and the other workmen were directed by the foreman to use the defective ladder in accomplishing a particular end, yet the manner of using it, and the precautions which they should or might take in using it, so as to avoid injury, were left to their own discretion."

This statement has peculiar application in view of the contention which the defendant in error will make, that he was directed by the foreman to splice and use the ladder which caused the accident.

In the case of *Meador v. Lake Shore & M. S. Ry. Co.* (Indiana), 37 N. E. 721, the court would not permit a recovery for an accident happening by reason of a defect in a ladder though the servant had notified the master of such defect, saying:

"No contrivance could be simpler in its construction than this 5-foot ladder,—not even a hoe, an axe,

or a spade. Appellant had at least equal knowledge with the company as to the nature and condition of the ladder. The right of the plaintiff to maintain this action is founded upon the negligence of the defendant in not furnishing a proper ladder for the use of the plaintiff in the work he was engaged to perform. It rests upon the principle that it is the duty of the master to the servant, and the implied contract between them, that the master shall furnish sufficient properly constructed and safe machinery, or other materials and appliances, to be used in the course of his employment, and necessary for the service. As a general rule, it may be assumed that the master, who employs a servant, has a better and more comprehensive knowledge of the machinery and materials to be used than the employe, who has claims for his protection against the use of defective, inadequate, or improper machinery, materials, or appliances while engaged in the performance of the service required of him. The rule stated, however, is not applicable in all cases. Where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work he is required to perform, and a full knowledge of the existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof."

In *McGill v. Cleveland & S. W. Traction Co.* (Ohio), 86 N. E. 989, a recovery was sought because of an injury from a defective ladder, the master having promised to repair the defect. The court said:

"The law requires masters to exercise ordinary care to provide reasonably safe tools and appliances for their servants. But the foregoing rule has no application where the servant possesses ordinary intelligence and knowledge, and the tools and appliances furnished are of a simple nature, easily understood, and in which defects can be readily observed by such servant."

The Supreme Court of the State of Washington has recognized and applied the same rule with regard to a simple instrumentality. In the case of *Cole v. Spokane Gas & Fuel Co.,* 66 Wash. 393, the court said:

"The master could have no more knowledge of such a defect (absence of rivets in handle of wheelbarrow) than the servant possessed, for the instrumentality was so simple that it was the duty of the servant to know its condition, and either call the attention of the master to it or protect himself against the possibility of injury. The rule seems well established that an implement of simple structure, presenting no complicated question of power, motion or construction, and intelligible in all of its parts to the dullest intellect, does not come within the rule of safe instrumentalities, for there is no reason known to the law why a person handling such instrument and brought in daily contact with it should not be chargeable equally with the master with a knowledge of its defects."

Citations might be multiplied at far greater length to establish this contention. We believe the adjudicated cases which are well considered have established the rule that a servant is entitled to rely upon the assumption of supervision and inspection by his master when he is put to work with any complicated tool or machinery, and this is true even though the servant is equally skilled and has equal opportunities of discovering a defect; but when the appliances with which the servant works are as simple as are cross pieces nailed upon two uprights constituting a ladder, the servant has no right to trust blindly upon any such assumption.

The plaintiff below assumed the risk of the frailty of the ladder and was guilty of contributory negligence in using it as he did.

The ladder with the broken rung will be before the court so that an opportunity will be given, without a descripiton here, to observe its flimsiness. Upon this piece of wood, perhaps a half inch in thickness, fastened with two small brads, plaintiff placed his weight of one hundred sixty pounds, which was augmented by a cable carrying an hundred wires (Record p. 29) which he was holding and he did this without testing its security. We do not believe the conclusion can be escaped that he was not only careless but foolhardy in the extreme.

He complains now because the rung or cross piece was cross-grained. Cross- or straight-grained the result would probably have been the same, for it would seem apparent to any man of ordinary intelligence that this cross piece was incapable of bearing such a weight. Yet, that the piece of wood that constituted the rung was cross-grained he could have noticed by a moment's observation, as appears from that portion of the testimony which we have quoted in our statement. So manifestly flimsy was the ladder that Filer, who was using the short 6-foot end the night before, discarded it on that account and built himself a ladder of his own. (Record p. 102.)

Recognizing without dispute the rule that contributory negligence and assumption of risk is ordinarily a question for the jury, we nevertheless are

convinced that in this particular case the undisputed testimony clearly established that the plaintiff below assumed any risk which existed and by his negligence contributed to the injury, that there is no question for the jury to decide.

In the case of *Flaherty v. The Truro,* 31 Fed. 158, the question was as to the negligence of a libelant who failed to appreciate the insecurity of a batten upon a ladder. Judge Benedict said:

"As to the security of the fastening of the batten at the time the libelant used it, he was as well able to judge as the ship's owner. Any defect in the nailing that would have appeared to any one would have been as apparent to the libelant as to the ship's owner. If the ship's owner is chargeable with knowledge of the insecure condition of the batten, the libelant, who used the ladder, is chargeable with the same knowledge. No person is justified in trusting himself upon a ladder without giving it that reasonable scrutiny which any person of ordinary intelligence about to use such a structure would naturally give it. If the libelant had scrutinized the batten to any considerable degree before trusting to it, he would have learned that it was insecure, and would have put his hands on the sides of the ladder, instead of on the batten, and so reached the hold in safety. His failure so to scrutinize the batten before trusting to it was negligence."

Nor may the plaintiff below absolve himself of the charge that he knew or should have appreciated his peril by the assertion that he relied upon the direction of the foreman, Smith, to fasten the short pieces of the ladder together so that they might go upon the wall. Smith had under his superintendence

several other pieces of work and crews of men between whom he was passing from time to time during the day. His notice of what the men were doing or of the character of the appliances they were using was necessarily superficial.

Upon the afternoon of the day before the accident happened when plaintiff and his co-servants spoke to Smith about ladders, saying they had none long enough to reach where they wanted to go, Smith told them to splice some of the short ones together. There were then five short pieces of ladder at this place. Manifestly, the opportunity of Smith to observe the safety or the insufficiency of these pieces of ladder as he passed by was not as good as that of the plaintiff himself. This the plaintiff below knew, and it would be ridiculous to permit him to assert that he used the ladder relying upon the assumption that Smith had vouched for its safety when he himself had manufactured the ladder and if it was defective could have easily observed it.

The plaintiff below failed completely to prove his cause of action.

The plaintiff alleges as the very gist of his cause of action as follows: "That certain ladders had been furnished for said gang of men by the defendant for their use, and plaintiff had nothing to do with the furnishing of said ladders." The proof, however, showed that upon the contrary not the defendant but the plaintiff and his fellow-servants furnished their

own ladders, and the plaintiff actually builded the very ladder upon which he was injured.

In actions for personal injury in order to propose the cause of action at all plaintiff must state the specific acts of negligence relied on. These acts, when alleged, constitute the very gist or gravamen of the action. Unless these acts are proved substantially, the case fails completely. No rule is better settled than that the plaintiff, if he charges specific acts upon which he relies to show negligence, must prove them as charged. To show a different set of facts upon which he relies is an attempt to prove a new and different cause of action. Certainly the charge that the master furnished the servant with defective appliances is one thing, while a case where the master furnished no appliances (the servant furnishing his own) is quite another and a different thing, and proof of one will constitute an entirely different cause of action from the other.

We have in this state a statute common to all the states, reading as follows:

"When, however, the allegation of the cause of action or defense to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof."

Remington & Ballinger's Code, Sec. 301.

It is well to bear in mind the proper meaning of the expression "cause of action." It is constituted, as Mr. Pomeroy says, of the facts from which the

plaintiff's primary right has arisen and the facts constituting the defendant's delict or act of wrong. (*Pomeroy's Remedies and Remedial Rights,* 2nd Ed. Sec. 453.)

Manifestly if this definition is followed, if there be a change in the acts constituting the defendant's delict, there is a difference in the cause of action.

Says Mr. Pomeroy, Sec. 554:

"The very object and design of all pleading by the plaintiff, and of all pleading of new matter by the defendant, is that the adverse party may be informed of the real cause of action or defense relied upon by the pleader, and may thus have an opportunity of meeting and defeating it if possible at the trial. Unless the petition or complaint on the one hand, and the answer on the other, fully and fairly accomplishes this purpose, the pleading would be a useless ceremony, productive only of delay, and the parties might better be permitted to state their demands orally before the court at the time of the trial. The requirement, therefore, that the cause of action or the affirmative defence must be stated as it actually is, and that the proofs must establish it as stated, is involved in the very theory of pleading."

The author, after remarking that it would be arbitrary and technical to impose a penalty for a mere variance, continues:

"Finally, if the divergence is total, that is if it extends to such an important fact, or group of facts, that the cause of action or defense as proved would be another than that set up in the pleadings, there is plainly no room for amendment, and a dismissal of the complaint or rejection of the defense is the only equitable result. It should be noticed that, in order to constitute this total failure of proof, it is not nec-

essary for the discrepancy to include and affect each one of the averments."

(See 31 *Cyc.* 674, 686.)

The Supreme Court of our state has applied the statute quoted to the following facts in the case of *Albin v. Seattle Electric Co.,* 40 Wash. 51. In that case plaintiff alleged that defendant started its car in motion while he was alighting, but his proof was that the car had not stopped. The court said:

"If the facts constituting negligence are specifically alleged, the pleader, in presenting his evidence, should be limited to proof of such facts, otherwise there would be a variance to the prejudice of the opposite party."

In *Higgins v. Mayor, etc. of Wilmington* (Dela.), 51 Atl. 1, plaintiff alleged that because of an excavation in the street he was hurled from a wagon and injured. He proved that, fearing the wagon was going against a tree because of the excavation, he jumped out. It was held a fatal variance for which no recovery could be had.

In *Waldhier v. The Hannibal & St. Jos. R. R. Co.,* 71 Mo. 514, plaintiff charged defendant with negligence in using defective machinery in running its cars. Proof showed a defect in the track, but no other negligence. This was held a complete failure of proof, which precluded recovery.

See also *Chun v. Kentucky, etc. Co.'s Receivers* (Ky.), 64 S. W. 649.

In *St. Louis, etc. Ry Co. v. State* (Ark.), 26 S.

W. 824, plaintiff alleged defendant's failure to ring a bell on a passenger train going south. This was held to be a total divergence, precluding recovery.

See *Pennington v. Detroit, etc., Ry. Co.,* 51 N. W. 634.

Mr. Thompson, an author who cannot be said to be wedded to techincal rules which will operate against the right of plaintiff to recover for personal injuries, in his work on *Negligence,* Vol. 6, Sec. 7471, says:

"In actions for damages for negligence the *allegata* and *probata* must correspond * * * But where he (plaintiff) avers that the negligence of defendant consisted in one thing, and then proves negligence consisting in something else, he ought not to be allowed to recover."

See also

Santa Fe, etc., Ry. Co. v. Hurley (Ariz.), 36 Pac. 216.

Woodward v. O. R. & N. Co. (Ore.), 22 Pac. 1076.

Chi. & E. I. R. Co. v. Driscoll (Ill.), 52 N. E. 921.

Carter v. Kansas City, etc., R. Co. (Ia.), 21 N. W. 607.

Patterson v. Westchester Ry. Co., 49 N. Y. S. 796.

Coleman v. Metropolitan St. Ry. Co., 81 N. Y. S. 836.

T. W. & W. Ry. Co. v. Foss, 88 Ill. 551.

In *East Tennessee Coal Co .v. Daniel,* 42 S. W.

1062, the court held that plaintiff must confine his proof to the negligence alleged, and that defendant was not precluded from objecting to the divergence because he had not objected to the testimony. The court says:

"The question of insufficiency of hands was not the subject of direct proof, but was, rather, an inference to be deduced from the nature and character of the work to be performed. * * * It would have been difficult for the defendant to interpose such specific objection as would have eliminated this question from the proof."

We will not be found contending for any narrow technical rule which shall require a party to make each item of his proof correspond with his allegation, but we do assert that when a party alleges facts constituting a cause of action he is not entitled to a recovery upon proof of facts diametrically different, and indeed irreconcilable with those which he has pleaded.

Had the plaintiff below alleged the actual facts in his complaint, he could not, as we believe we have hereinbefore demonstrated, have gotten by a demurrer. Conceding the widest liberality, we contend that proper practice does not permit a recovery in this case because of the failure of the plaintiff to prove the cause of action alleged.

For the reasons above suggested we respectfully submit the judgment should be reversed.

PILLSBURY, MADISON & SUTRO,
HUGHES, MCMICKEN, DOVELL & RAMSEY,
Attorneys for Plaintiff in Error.

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Plaintiff in Error,* v. FRANK STARR, *Defendant in Error.*	No. 2242

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

PRELIMINARY STATEMENT.

Owing to a limitation of time we have been compelled to prepare this brief in advance of the receipt of the printed brief of Plaintiff in Error. Through the courtesy of its counsel, we have been furnished, in advance of publication, with a copy

of their manuscript, which, however, was completed after much of the work of the preparation of this brief had necessarily been done. Some of the authorities which are cited therein cannot be discussed in detail in the circumstances, but the general principles involved can be dealt with herein.

STATEMENT OF THE CASE.

In a general way we have no criticism to offer to the statement of the case contained in the brief of Plaintiff in Error. There are certain additions which we deem it necessary to make thereto in order that the particular theory of the Defendant in Error may be made plain to the court.

Though it is of no particular importance it may be well to say that the cable was being strung upon the building at the place of the accident at a height of about 25 feet (Record, page 25) instead of 20 feet, as stated in our complaint and in the brief of Defendant in Error.

It is inaccurate to say that the company permitted the installers to secure their own ladders. This may become an important question in this case and therefore in addition to the testimony set forth in the opening brief, we quote, as follows:

From the testimony of George E. Smith, Foreman:

"Q. Now, by whom were the ladders supplied

for the use of the construction men, whose business was it?

A. The majority of them were supplied by the Telephone Co.

Q. How were they supplied, through whom? Through you or to the men individually?

A. Well, as a general thing, I got the ladders, that is when they were telephone ladders.

Q. Was it always possible to get a sufficient number of ladders from the Telephone Co?

A. No, sir.

Q. In that emergency what were you accustomed to do?

A. If I was right around there, I always told them to go borrow them, go get them.

Q. How many men can use a single ladder in the work which you were superintending?

A. Sometimes there is only one man, but when we are out in the street that way, around buildings, there is always two." (Rec., pp. 22-23.)

From the testimony of Thomas McCartney:

"Q. What was the understanding as to who should provide ladders whether the company or the men, whose business was it to provide the ladders?

A. It was the Company's." (Rec., p. 38.)

From the testimony of Witness R. D. McMellon?

"Q. Who undertook to furnish the ladders that were used by the men employed by the company?

A. The company was supposed to furnish them.

Q. Through whom did they furnish them?

A. Through the foreman.

Q. Did they always supply a sufficient number?

A. They didn't at any time prior to the accident.

A. No.

Q. From time to time they didn't supply enough?

A. Never that I knew of.

Q. Now, hen a job required a larger number of ladders than the company supplied, what, if any, directions were given by the foreman?

A. The foreman directed us to borrow ladders wherever we could get them, as a rule." (Record, p. 57.)

From testimony of the witness J. W. Werner:

"Q. Who was supposed to furnish the ladders, the company, or the men?

A. The Company." (Record, p. 67.)

From the testimony of C. F. Dalton:

"Q. Who was supposed to furnish the ladders for the use of the men?

A. The Company was.

Q. Did they always furnish a sufficient number?

A. No, sir, not when we were in the gang.

Q. When the number of ladders on the job was insufficient, what did the foreman do?

A. If he couldn't procure them, he would tell us to rustle them, get them any way we could."

From the testimony of plaintiff, Starr:

"Q. Who was supposed to furnish the ladders for use in this work that you were doing?

A. The Company." Record, p. 84.)

From testimony of defendant's witness, Filer:

"Q. The Company was supposed to furnish these ladders?

A. Yes, they were supposed to furnish ladders." (Record, p. 100.)

Reference is made in the opening brief to the testimony of defendant's witness, Filer, to the effet that he discarded the ladder which broke because he considered it frail.

We add to his testimony as quoted, the following, from page 103 of the Record:

"Q. Did you notice the cross-grain of that?

A. No, I didn't notice the cross-grain.

Q. But it looked like a frail ladder?

A. It looked like a frail ladder.

Q. Did you call the attention of the boys work-

ing on the job to your having discarded it, or the reason you did it?

A. I don't recollect that I did." (Record, p. 103.)

With respect of the direction of the foreman Smith to the men, to splice together the Filer and McCartney ladders, it is said in the opening brief that Smith "happened at the place where plaintiff was working." Since a point is made of this later in the brief it might be well to quote the testimony of the foreman appearing on page 33 of the record:

"Q. How much time did you spend at this job on Post St?

A. Well, along there. I used to go along there possibly four or five times a day.

Q. Just passed by there and observed the work and gave what directions you thought necessary and go on to some other place?

A. Yes, sir.

Q. You didn't linger there and take a hand in the work? That is what I am getting at.

A. *Like in putting the cable up, whenever they were stringing a cable I was always right there.*"

It is said that some one told Smith that a longer ladder was required, and that he directed whoever asked him to splice together some of their short pieces, *there being five short pieces of ladder at the place.*

The conversation was with the men in the gang. (Record, p. 28.)

" * * * So I told them to splice them two ladders together and use them. I don't know as I said two ladders. I said, "Splice them ladders together and use them."

"Q. There was just these other two short ladders on the ground besides this long ladder?

A. Yes, sir." (Record, p. 28.)

From the testimony of the same witness, we quote:

"Q. Now, did you point out the particular ladders they were to splice together, or did you just say, 'Splice two of your short ones together?'

A. Well, there were only just the two short ones that were there, that they did splice together." (Record, p. 34.)

On re-direct, he said:

"Q. I understand you that two of the pieces of ladder that you referred to were the two pieces of the company ladder?

A. Yes, sir.

Q. That was an extension ladder?

A. Yes, sir.

Q. And was in pieces, that is, they could be separated?

A. Yes, sir.

Q. Now, were they being used as one ladder on that job?

A. On that job; yes, sir.

Q. Would either piece of it, separately, be sufficient to do the work of the height that that cable was being put up?

A. No, sir.

Q. Now, two of the other pieces were the ones you have already testified to, as having been borrowed by McCarthy and Filer?

A. Yes, sir.

Q. What was this other one?

A. The other one was the one Filer was using.

Q. He was using that?

A. Yes, sir.

Q. When these other people spoke about wanting another ladder, you referred to what ones when you told them?

A. Why, the ones that they had spliced together.

Q. Those were the ones you referred to?

A. Yes, sir.

Q. Told them to splice them together and go up on them?

A. Yes."

On this point McCarthy testifies, as follows:

"Q. Before recess was taken this morning, you stated that on the afternoon before the morning of the 15 of Sept., 1911, the foreman was at the place of work, and in response to a request for ladders, he said to splice together the ladders you had, and there were just these two pieces which could be spliced together?

A. Yes, sir." (Record, p. 45.)

In the opening brief it is said that when Starr went upon the ladder he held a portion of a heavy cable which added greatly to his weight. The testimony shows, (Record, p. 47), that the end of the cable was 13 feet long, and that it would go possibly three-quarters of a pound to a foot, (Record, p. 29), so that the added weight was approximately five pounds.

Some of the testimony of plaintiff and of his witness McMellon is quoted upon the question whether Smith, the foreman, should have discovered the cross-grained rung. As the character of the defect is of the greatest importance we shall quote more at length from the testimony of the various witnesses.

Our contention is that the evidence shows that the defect was one not obvious to ordinary observation by one using the ladder; that cross-grained rungs are seldom used in a ladder, so that there would be nothing to put the servant upon his guard, and that such a danger is not one of the ordinary dangers encountered in the use of a lad-

der; but that this condition could have been discovered by a proper inspection by the master. The Filer ladder, so-called, was the one which broke, and the testimony hereafter quoted is limited to that portion of the spliced ladder alone.

In order to demonstrate these propositions, we quote as follows:

Plaintiff, Frank Starr, testified:

"Q. You saw it though on the job?

A. I saw it, glanced at it.

Q. Did such observation as you gave to the ladders, or either of them, disclose any danger about them?

A. No sir, I thought they was perfectly safe." (Record, p. 85.) * * *

"Q. Did you at any time before your accident know that there wasn't a cross-grained step in either of these ladders?

A. No, sir.

Q. How long were you accustomed to work with ladders?

A. About four years.

Q. Is it common for rungs of ladders to be made of cross-grained pieces of wood?

A. No sir, it is not.

Q. Would you say that this was rare or only occasionally?

A. It is very seldom you will find them.

Q. Is such a rung safe for men to go up on?

A. No, sir, it isn't safe.

Q. If you had known that there was a cross-grained rung there would you have gone up on it?

A. No, sir, I wouldn't." (Record, pp. 86, 87.)

Foreman Smith testified as follows:

"Q. I will ask you to state whether or not cross-grained sticks are usually used for rounds of ladders.

A. No, sir, they are not.

Q. Would you say that their use is very seldom?

A. Yes, sir." (Record, p. 26.)

"Q. Now, did you observe that there was any cross-grained round in the shorter of these two ladders?

A. No, sir.

"Q. Was the fact that it was cross-grained apparent to just an ordinary observation, such as one gives to a ladder in using it?

A. I didn't quite understand how you got that.

Q. You saw the ladders in use and saw them on the ground?

A. Yes, sir.

Q. Was this cross-grained condition apparent to you, was it apparent to you?

A. No, sir.

Q. Would it be apparent to an ordinary look, if one would look at the ladder, would it be apparent to him, I mean without a special inspection of the round?

A. No, I don't think it would.

Q. Did you make any inspection of either of these ladders?

A. No, sir.

Q. Was there anyone else in direct charge of these men or of the appliances that they were using besides yourself?

A. No, sir." (Record, pp. 28, 29.)

McCartney testified as follows:

"Q. I didn't make myself clear. How long have you worked at work where you had to use ladders—How long have you done that in your lifetime?

A. I have been using ladders for two years—about two and a half years.

Q. Is it customary to make ladders with a round that is cross-grained?

A. No, sir, it isn't.

Q. Is such a ladder safe?

A. No, sir.

Q. What would you say as to whether the use of cross-grained rounds is rare or not, does it happen once in many times?

A. It is rare. (Record, p. 41.)

"Q. You saw this ladder as it was used about there from time to time?

A. Yes, sir.

Q. Did you observe any cross-grained rounds in the ladder before the accident?

A. No, sir.

Q. If there was any cross-grained piece there, was it so apparent that a man in the ordinary use of the ladder would see it?

A. Not that I noticed.

Q. Would such a cross-grained piece be safe to go upon?

A. No, sir." (Record, p. 42.)

Witness, McMellon, testified as follows:

"Q. Did you see this ladder that was used for the job before the day of the accident?

A. Yes, sir.

Q. What was its color and appearance?

A. It was a dark, weather-beaten ladder, unpainted.

Q. Was it rough or smooth?

A. As near as I can remember it was a rough finished ladder.

Q. Did you, from such observation of it as you made, see any cross-grained rungs in it?

A. No, sir.

Q. How long have you been accustomed to use ladders in the way of business?

A. For the last four or five years.

Q. Is it customary to have rungs, cross-grained rungs, in a ladder?

A. No, sir, it is not.

Q. Is such a rung safe for use?

A. No, it is not, it is unsafe.

Q. You didn't observe, however, that there was any cross-grained rung in this ladder at the time before the accident?

A. No, sir, not before the accident.

Q. Was the fact that it was cross-grained observable then, by the ordinary use of the ladder without a particular inspection?

A. No, sir, it was not." (Record, pp. 59, 60.)

It appears that the the time of the accident this witness was waiting for an opportunity to use the same ladder. (Record, p. 60.)

We cannot agree with Plaintiff in Error in its statement that the ladder was not furnished by the company. Physically, the two parts, which were

afterwards spliced together, were procured by McCartney and Filer. They were made into one ladder at the direction of the Foreman, and the men were by him directed to use it. (Record, pp. 28, 44, 59.)

We shall contend that in the circumstances in which this ladder was furnished it was in law and in fact furnished by the Company.

Other facts will be referred to in our argument.

ARGUMENT.

I.

The first point made by Plaintiff in Error is that the rule which imposes liability upon an employer who furnishes unsafe appliances has no application here, because it is said the company did not furnish the appliance but the same was selected by the defendant in error and his fellow servants.

The rule is well settled that where the master undertakes to furnish the tools and appliances, he is bound to use reasonable care to see that such appliances are reasonably safe for the use intended. This is a non-delegable duty of the master and one who performs it, even though in other respects a fellow servant of the other employees, represents for that purpose the master, and his negligence is the negligence of the master.

4 Thompson on Negligence, Secs. 3949, 3950, 3791, 3792.

Flanigan vs. Guggenheim Smelting Co. 44 Atl. 762.

The record shows that the Company undertook to furnish ladders for the use of the installers; that these lalders were furnished through the foreman only; that when it happened that not enough ladders were furnished by the company the foreman would direct the men to borrow other ladders, and, if he were absent, the men, having their work to do, themselves attempted to borrow them. It was not shown that it was the duty of the men, as a part of their employment, to furnish ladders for themselves, nor that if they failed to do so, in the absence of a sufficient number of company ladders, they would he blamed. Moreover, the McCartney ladder was safe and strong. The Filer ladder, which broke, was sufficient for the purpose for which it was borrowed, namely: for reaching to a cable box six or eight feet high. These ladders were not secured by the men as material for the making of another ladder, but were secured for work which did not require the workmen to go much above the ground. The men had no intention of splicing these ladders together and making a longer one. The record shows that when the foreman came to the place of work the afternoon before the accident the men asked him for company ladders—he being the only source through which such ladders could be procured, and being the servant designated by the company to furnish ladders to the gang—and that he directed that these two par-

ticular ladders should be spliced together to make a longer one. This was an adoption by the company of these shorter ladders as material for the manufacture of a stronger ladder, and an adoption of such longer ladder as an instrumentality of the work, and was the method which it took to supply them with ladders in accordance with its duty. The spliced ladder thereby became the company's ladder, and it assumed responsibility therefor, except as to the splicing which the foreman delegated to McCartney and Starr. If the long ladder had broken at the splice through any defect in workmanship, no doubt the company would not be liable. But the splice held. It was the material which the men did not procure for use in making a longer ladder, but which the foreman did direct them to use, and that gave way.

The authorities cited by Plaintiff in Error, under this subdivision, in no particular upholds its contentions, for the reason that they all contemplate a condition where it is a part of the duty of the servant, under his employment, to furnish his own tools and appliances. As showing this distinction, we call attention to the citation from Shearman & Redfield on Negligence, Sec. 195, quoted in its brief. This case falls within the first class there cited, being one in which the master himself undertakes to furnish the instrumentalities for the servant's use, and in which the negligence is that of the master; and not within the second class, where the

servants are employed to furnish them for themselves and their fellow servants.

With reference to the rule in scaffold cases suggested in the brief, we have to say that we consider the rule of such cases analogous to that which applies in this case. The rule, however, is improperly stated, in the brief of Plaintiff in Error, to be that where the master has permitted a servant and his fellows to construct their scaffolding for themselves there is no liability. The rule laid down by the courts is this: That if the master furnish sufficent material of good quality for the use of his servants, and direct them to make the scaffold therefrom, he is not liable if the injury is caused either by their negligent manner of constructing the scaffold, or by their negligently selecting improper material from among that furnished by the master. So, here, if the two ladders which the foreman directed McCartney and Starr to splice had been proper material for the making of a ladder, or, if there had been several short ladders, some of them sufficient and some insufficient, from which the foreman directed the servants to make selection, and they had made an improper selection, and if the accident had occurred either by reason of an insufficient splice, or by reason of the selection by them—negligently and needlessly—of a defective piece, then there could be no recovery here. But, as already pointed out, there were these two ladders alone which could be spliced together. They

were spliced by order of the foreman; the splice did not give way; the injury occurred from a defect in one of the pieces so directed to be used. Under the doctrine of the scaffold cases, plaintiff would be entitled to recover.

The error into which counsel fall is due to the three erroneous assumptions:

1st. That the Servants and not the company engaged to furnish the ladders;

2nd: In assuming that because fellow servants of Starr borrowed these short ladders for work to be done near the ground, they borrowed them for the purpose of being used as material in making a longer ladder;

3rd: That the use of these ladders in making the longer ladder was due to the volition of the servants and not to the command of the foreman; and

To their overlooking the fact that the use to which the spliced ladder was put, and which required the use of the defective rung, was directed by the foreman himself.

All these assumptions are directly contrary to the record as cited in our opening statement; and the direction given by the foreman was shown without contradiction in the record.

It is well settled that, as between the servant and the master, all appliances owned by another,

of such a character and use as would impose the duty of inspection, which the master directs or authorizes his servant to use in the business of the master, stand upon the same footing as those that actually belong to him. If the master is not in position to safe-guard his servants by an inspection of such appliances he must refrain from giving them orders to use them whereby their safety will be imperilled.

This statement is summarized from *DeMaries vs. Jameson,* 108 N. W. 830. As supporting the same rule see 1 Labatt, Master & Servant, Secs. 171, 172.

In *Ralph vs. Am. Bridge Co.* 30 Wash. 500, defendant used as a ladder an inclined beam across which cleats had been nailed by some one not in defendant's employ. The court quoted with approval as follows:

"While appellants used it in their business they furnished it to their employees and it mattered not at all whether they built it themselves or got it by gift of another, or through right of established custom. By whatsoever means they acquired it, they were in any event bound by the duty imposed upon them by the law to exercise a reasonable degree of care for the furnishing of it as a place for their employees to work."

It was held that the duty of supervision and inspection of such necessary appliances was imposed upon the defendant.

II.

The Second point made in the brief of the Plaintiff in Error is stated as follows:

"Under the adjudicated cases recovery is not permitted because of an accident occasioned by the use of as simple an appliance as a ladder."

Before considering the particular authorities relied upon by Plaintiff in Error it may be well to advert to the general principles governing this class of cases. In this discussion we shall not cite authorities, because the principles are so well known, and have been so often declared, as to have become the common property of the Bench and Bar of this country.

The duties of the master and servant respectively, so far as they have reference to accidents occurring to the latter, are distinct and separate. This case involves the duty of the master and of the servant with respect of the tools used in the prosecution of the master's business. The master's duty may be said to be as follows:

He is bound to use reasonable care to provide reasonably safe tools and appliances for the servant's use in the doing of the work. This general duty may be subdivided into his duty to furnish tools which are in the first instance reasonably safe, and the duty of inspection of such instrumentalities from time to time to see that the tools remain fit for use. The duty of the servant, on the other hand,

is to work with the tools so furnished him, and to exercise, for his own safety, such care as persons of ordinary prudence similarly situated do exercise. It is never the duty of the servant to inspect such tools unless he be employed for that specific purpose, or unless he have notice of some defect, sufficient to put him on inquiry. The sufficiency of the notice, however, is ordinarily a question of fact.

The master is excused from his duties in but one case, and that is in the case of injury to a servant employed to perform them for the safety of other employees.

It is sometimes loosely said that the master is excused from inspection where the defect causing the injury is latent, and not discoverable by inspection, or where the defect is so obvious that it will be apparent to the servant using the instrumentality. With respect of the first class of cases, it would be more exact to say that the failure to inspect is not excused, but the failure on proper inspection to discover the defect is excused, because of the latent character of the defect. With respect of the second class, the statement is altogether inaccurate. The master is not excused for a failure to inspect the instrumentality because the defect in it is obvious; on the contrary, to permit the use of dangerous instrumentalities, allowed to remain in that condition because of a lack of proper inspection, is negligence on the part of the master, but he is excused from liability because of

the doctrine of the assumption of risk. This doctrine does not dispute the negligence of the master, but raises an affirmative defense in his favor.

As we have said, except in the instances adverted to, no duty of inspection devolves upon the servant. It is his business to work and not to inspect.

There are certain risks which it is said the servant assumes. They are:

1st: Those risks which are inherent in the occupation itself;

2nd: Those risks which are known to the servant, and

3rd: Those risks which are obvious to one situated as the servant is, and which he would know and appreciate in the exercise of ordinary care.

There has latterly grown up what is sometimes referred to as the "common tools doctrine." Counsel for the master sometimes speak of this doctrine as being separate from, or an exception to, the ordinary rules of law to which we have just adverted. On the contrary, the "common tools doctrine" is based upon the very principles already discussed. Roughly speaking this doctrine is that with respect to injuries arising from defects in common tools simple in their nature, *and the risk of injury from which is obvious*, the servant is not entitled to recover. It is not always made plain by the authorities upon the point what the true

basis of this doctrine is, but the vast majority of the cases base the doctrine upon the fact that the danger is obvious, and, therefore, that the risk of injury is assumed. In all those cases in which this reason is not given it appears from the facts stated that the defects were apparent and the risks obvious.

This is no new doctrine. From the very first announcement of the doctrine of assumption of risk it has been understood that a risk which is obvious and apparent to the servant is assumed by him. The reason, and the only reason, for speaking of the common tools doctrine as being applicable to a special class of cases, is that in such cases the defects are usually either so obvious as to give rise to an assumption of risk, or, are of such latent character as not to be discoverable upon inspection. No court has ever attempted, so far as we are aware, to say that merely because a tool is a common or a simple one the defect *in point of law* is obvious, or that the master is not liable for injuries caused by defects therein. In other words: it is not the name of the instrumentality but the circumstances of the injury which determine liability or non-liability.

The question whether or not a defect is obvious and apparent, always depends upon the circumstances of the particular case. Among those circumstances the simplicity of the instrumentality is, of course, an important factor.

It is because the circumstances attending an injury occasioned by a defect in a common tool do so commonly show that defect was obvious and the risk therefore one assumed by the servant, that some persons have been led to the erroneous conclusion that recovery can be had in no case for an injury occasioned by a defect in such an instrumentality.

AUTHORITIES OF PLAINTIFF IN ERROR.

A great many cases have been cited by the Plaintiff in Error in an obvious attempt to deduce a general doctrine of non-liability for injuries from defects in common tools, but the cases so cited, when in point at all, sustain the general observations hereinbefore made. It may be said substantially of all of them that, where the nature of the defect appears in the statement of the case, that defect was an obvious one, and in the most of the cases the courts so state.

We shall not discuss them separately, except the ladder cases. A few of them we have not been able to examne in the time at our disposal. The instruments of injury—except in the ladder cases—were as follows:

Vanderpool vs. Partridge, 13 L. R. A. (N. S.) 668 (Splinter from rasp used as a chisel); *Williams vs. Bunker Hill & S. Mining Co.* 190 Fed. 79 (Injury from trolley wire); *Maki vs. U. P. Coal Co.*, 187 Fed. 389 (Unguarded cog wheels);

Cole vs. Spokane Gas & Fuel Co., 66 Wash. 393 (Pan used for carrying coke; rivets loose in handle); *Deaton vs. Abrams*, 60 Wash. 1 (Fall of pile of 4-foot slabs, 18 feet high); *Soderberg vs. Wells*, 57 Wash. 281 (Brick laid in improper courses); *Wachsmuth vs. Shaw Elec. Co.*, 76 N. W. 497 (Snap hammer); *O'Brien vs. M. K. & T. Ry. Co.* 82 S. W., 319 (Worn out wrenches); *Schulz vs. Johnson*, 7 Wash. 403 (Defective rope used to support a weight to pull back a saw); *Holt vs. C. M. & St. P. Ry. Co.*, 69 N. W. 352 (Pinch bar used to move car); *McMillan vs. Minette Shade Cloth Co.*, 117 N. Y. Sup. 1081 (Board with cleats nailed on it used to smooth rollers); *Sterling Coal & Coke Co. vs. Thorpe*, 131 S. W. 1030 (Shovel with a crack in the grip of the handle); *Chicago B. & Q. Ry. Co. vs. Shalstrom*, 195 Fed. 725 (Giving way of stringer).

In each of these cases the defect was held by the court to be obvious, and in the most of them the servants had made complaint of such defects prior to their injury. It does not require a special doctrine concerning common tools to account for the holding in these cases. The servants could not recover because they assumed the risk of obvious defects.

In some of the cases the principle is laid down that a servant canot profess ignorance of a danger which a person in his situation could not have failed to perceive and appreciate.

In the *Vanderpool* case, 13 L. R. A. (N. S.) 668, in applying the "common tools" rule, the court said:

"The reason for the rule is that any defect in such simple tools or appliances would be as obvious to the servant as to the master."

A number of ladder cases are cited by the Plaintiff in Error, but these all present the same circumstance, namely that the risk was obvious to the servant using it; and in many of the cases the servants had complained to their superiors prior to the happening of the accidents. Thus, in all the cases the defects were apparent, and in many of them it affirmatively appears that the defects were known.

Marsh vs. Chickering, 5 N. E. 56, is one of the leading cases on the subject under consideration. In that case the ladder was apt to slip; there were no hooks or spikes attached to it to prevent its slipping; the servant knew of this defect and complained of it several times, saying that there would be an accident. Here the defect was apparent and was known to the servant.

In *Jenney Electric L. & P. Co. vs. Murphy*, 18 N. E. 30, the syllabus is as follows:

"An employee of mature age and ordinary mental capacity, who is injured in his master's employ by reason of a defective ladder, one rail of which was broken off near the top, both master and servant knowing of the defect, and neither regarding

it as dangerous, cannot recover for such injury from his employer."

Stress is laid by the court on the knowledge by the servant of the defect; and the case really supports our contention that in the absence of such knowledge by the servant he would be entitled to recover.

In *Sheridan vs. Gorham Mfg. Co.*, 66 Atl., 576, 13 L. R. A. (N. S.) 687, the defect was that the spurs of the ladder were dull, so that they would not keep it from slipping. Held: the defect was obvious and the servant could not recover.

In a note in 13 L. R. A. (N. S.) the cases are collected. We call attention to those cited on pages 689, 690, under the heading: "Questions for the Jury."

In *McGill vs. Cleveland & S. W. Traction Co.*, 86 N. E. 589, the *plaintiff alleged that prior to the accident he discovered* the ladder to be "old, worn and defective to such an extent that the same was unfit for plaintiff to use" and specified particular defects, obvious in their nature. He alleged also having made complaint thereof ten days or two weeks prior to the accident, to his foreman and to the master mechanic. Relief was denied because the servant had full knowledge and therefore assumed the risk.

In *Borden vs. Daisy Roller Mill Co.*, 74 N. W. 91, there were no points at the bottom of the ladder to prevent slipping. It was held that the de-

fect was obvious and therefore the servant had no redress.

On page 93 of the report the court admits the rule that the employee is not required to search for defects.

Cahill vs. Hilton, 13 N. E. 339, is not really in point. From the evidence the court concluded that the accident was not caused by the breaking of the ladder, but that the ladder was broken by the accident. No defect in the ladder was shown, and the court was unable to see that there was a defect in the ladder which the master knew, and of which the servant, who had used it frequently, would be ignorant.

McGrath vs. Walsh. 4 N. Y. Supp. 705, was a ladder case. Two or three rungs were loose and would turn. The plaintiff had climbed it probably twenty times an hour for a day and a half. Held: Either the defect was patent and plaintiff must have observed it, or, for some occult reason which inspection would not disclose, the ladder suddenly became defective. In either case the master was not liable.

In *Henggler vs. Cohn*, 52 Atl. 280, the iron hinge of a step ladder broke. Held: there was no liability, because, if the defect was obvious, the servant would have observed it, and if it were not obvious inspection would not have disclosed it. In the first instance the servant would have assumed

the risk; in the second instance, the master would not have been negligent.

Hart vs. Village of Clinton, 100 N. Y. Supp. 1092, was a case where the servant was injured by the slipping of a ladder from a light mast against which it was leaning while in use. The ladder itself was sufficient, but it was claimed that it should have been supplied with hooks to hold it to the mast, or some other form of ladder should have been employed. The defects, if any, were perfectly obvious, and on general principles the risk was assumed.

Smith vs. Green Fuel Economizer Co., 108 N. Y. Supp. 45, was a case where the servant selected a warped ladder from a number of perfect ones. He put it too far away from the place he wanted to reach though he could have put it closer; he leaned over and tipped it, and it fell. The defect was obvious and the servant was negligent both in selecting it and in the manner of its use.

It will be observed, as we have heretofore stated, that in all these cases, the defects were perfectly apparent, and in many of them were actually known to the servants. Where it is claimed they were not known, the court has invoked the rule that the servant cannot plead ignorance of that which he must, in the nature of things, have known.

The only special rule which can be deduced from the "common tools cases" is this: That

whereas, in a case involving complicated machinery there may be knowledge of a defect without knowledge of the danger, and therefore there may be no assumption of risk. in the case of "common tools" knowledge of the defect ordinarily implies knowledge of the risk. This rule, however, is not absolute, as there may be known defects in common tools where the danger may not be known. For instance: if in this case Starr knew that the rung was cross-grained, he might not know it to be insufficient to bear his weight. If, however, he were to attempt to use it in its present broken condition, knowledge that the rung is broken would impute to him knowledge of the risk of his using that rung.

Having thus considered the authorities suggested by the Plaintiff in Error, let us now consider authorities tending to establish our contention.

Vol. 4 Thompson on Negligence, Sec. 3947, in part reads as follows:

"The master is under an affirmative duty to his servant to make a reasonable, diligent and skillful inspection and to resort to reasonable tests to see that any scaffold, ladder, etc., upon which he requires his servant to work, shall bear the weight to which he subjects it."

Secs. 3949 and 3959, of the same Volume, are as follows:

Sec. 3940: Whether the master undertakes to perform this duty himself, or through the agency

of another, he is liable for its negligent non-performance. For example, a company which undertakes to make and to furnish ladders for the use of its workmen, is bound to use reasonable care, to the end that the ladders shall be safe, and is responsible for the negligence of those whom it employs to construct them."

Sec. 3950. "This brings us to the next proposition, which is, that as this is one of those duties of the master which has been variously designated as a personal and unalienable, or unassignable duty, —though not in the sense of his being an insurer of its performance,—it is immaterial to whom or what grade of servant he delegates its performance; and, accordingly, a servant may recover damages of the master for his negligence in failing to perform this duty, although the negligence is that of a fellow servant to whom the master has committed the performance of the duty."

An analogous case is referred to in Sec. 3960 of the same Volume, as follows:

"Evidence that the defendant's foreman directed the plaintiff to go on the scaffold and go to work; that a plank on which the plaintiff and another were standing broke, precipitating them to the floor; and that the plank was cross-grained, and unfit for the purpose for which it was used,—is sufficient to require the submission of the case to the jury."

As to the duty of inspection we refer to Sec. 3786, of the same volume, which is, in part, as follows:

"The master is not only bound to make a reasonably careful inspection of the premises, machinery, tools and appliances which he provides

for the use of his servants, when they come into his hands, but he is also bound to repeat such inspections from time to time as often as may be reasonably necessary, having regard to the exigencies and risks of his business, to the end that they shall not be used by his servants after they get out of repair in such a sense as to be dangerous."

In Sec. 3791, it is said that this duty of the master is absolute and unalienable, and in the succeeding paragraph it is said that the master cannot absolve himself from this duty by a rule devolving it upon his servants generally.

Sec. 3951, of the same volume, in part, reads as follows:

"It is the duty of the master, and not the duty of the servant, to make the tests of such an appliance as above spoken of, and the servant is ordinarily entitled to rely upon the assumption that the master has done so; and the servant will not be liable on the ground of contributory negligence for failure to make such tests himself, or for using the scaffold, ladder, etc., unless the danger was so apparent that a person of ordinary prudence would not undertake the risk."

Sec. 3957, in part, reads as follows:

"It has been held that an employer who fails to furnish safe and suitable lumber for the construction of a staging by the employees for use in their work, and who, through his secretary, specially directs the use of a certain stringer in a specified place, is liable for an injury to an employee caused by the breaking of such stringer."

Sec. 4641. "On the other hand, the servant does not accept the risks of unknown, latent, unseen, or

obscure defects or dangers, such as the servant would not discover by the exercise of ordinary care and prudence, having reference to his situation, but such as the master ought to discover by exercising the duty of inspection which the law puts upon him to the end of seeing that the premises, tools and appliances with respect to which the servant is required to labor are in a reasonably safe condition, since the servant is not, in general, —except where he has agreed to do so by contract with his master,—required to institute special inspection for the purpose of discovering hidden dangers."

In Vol. 1, Sec. 407, Page 1136, Labatt's Master and Servant, appears the following:

"As a matter of ultimate analysis, it will be found that the logical basis of the doctrine which thus places the master and the servant upon different footings in regard to imputed knowledge of risks is to be found in the fact that it is the special and appropriate function of the former to furnish and supervise the instrumentalities of his business, and the special and appropriate function of the servant to use those instrumentalities. The duty of making reasonably careful examination of the instrumentalities is a natural and necessary incident of the former function, but not of the latter."

There are a number of cases where the tools were simple and where the defects could have been discovered by inspection, and yet it was held, either that the servant was entitled to recover or that it was for the jury to determine his right.

Thus in *Chicago & Pittsburg Milk Co. vs. Fehl*, 187 Fed. 792, the servant was supplied with defective lines. They had previously been broken

three times while used by him, and each time had been mended by another servant employed by the master for that purpose. The servant had driven a gentle team with these lines without accident. Afterwards he was supplied with new lines. They being needed for a parade in which the master was to be represented, the servant was again given the old lines to use in driving a somewhat different team. The team became frightened and started to run away and the lines broke occasioning the accident. It was argued that lines are a simple instrumentality, and that the servant was bound to know whether or not they were sufficient. It was held that the danger depended on many considerations, which the court named, and could not be said to be beyond question. Hence that the case was properly submitted to the jury.

In the case of *American Smelting & Refining Co. vs. McGee*, 157 Fed. 69, the servant operated a power punch. It was very simple. It had a die with a hole in it to receive the punch. There was a set screw with which the die was held in place so as to cause the punch to strike accurately in the hole in the die, but the set screw was broken. This defect could have been detected by the servant, who was an experienced workman, by examining the set screw, but it was not readily observable. Held: that the assumption of risk and contributroy negligence were not conclusive, and these were questions for the jury.

The court distinguishes between the duty of the servant to know of an obvious defect and of one which was not obvious, and says: "The break of the set screw and the looseness of the die which made it dangerous were not apparent. They could have been discovered by the plaintiff only by searching out the screw in the side of the block and trying it. The duty to make this search was not cast upon the servant."

In the case of *Chicago, K. & W. Ry. Co., vs. Blevins*, 26 Pac. 687, an employee of a railway company, working on a bridge, was thrown off his balance and injured by a fall. He asserted that the accident was caused by the rebound of a maul furnished him by the company for his use, the tool having a cracked and crooked handle and with a surface so battered and worn as to be dangerous, and that the rebound which caused the fall was due to the defective character of the maul. He claimed that the defect was not apparent to him because his work was being done in great haste. Held: a question for the jury, and a verdict for the plaintiff was upheld.

In *Wiliams vs. Garbutt Lumber Co.*, 64 S. E. 65, is a very able and valuable discussion of the questions at bar by Lumpkin, Judge; the entire case should be read, as it is the best discussion of the subject which we have seen. We will, however, quote from it somewhat at length as follows:

"The general rule requires a master to use ordinary diligence to furnish his servant with appliances reasonably suited for the use for which they are intended, and to use like diligence in inspecting and keeping them in proper condition for use. To this general rule some courts of other states have declared that there exists what has been denominated an exception as to "simple tools." The basis on which this has been placed by some of the courts is that where a tool or instrumentality is so entirely simple in its nature and character that its condition can be seen at a glance, or that one who uses it has as good an opportunity as the master for knowing its condition, the servant cannot recover on the ground that the master did not inspect it. In some of the decisions there is a broad announcement that the master is under no duty to inspect such simple tools. It will be found, however, that in most of the cases where this rule or exception was applied the controversy was between the master and the servant to whom he furnished the tool, and where the defect and danger were so apparent that the servant was guilty of negligence in using the tool, or where he knew of its condition, or had equal opportunity with the master for knowing it. The apparent hardship of holding the master to a high degree of diligence relatively to his servant in regard to inspecting very simple things, the condition of which must be patent to the person using them, appears also to have had weight in some instances."

On page 68 it is said:

"While these rules result practically in a relaxation of the master's duty and liability in the case of such simple tools, they are not at all in denial of the general underlying principle of the law of negligence that one who knowingly exposes another to a likelihood of injury is liable therefor, in the absence of consent by such other or of contributory negligence."

We quote further from page 68:

"The mere simplicity of a tool, as is apparent upon consideration of the basis above stated of the rule or respondent superior, will not exempt the master from all care, or relieve him from liability under all circumstances; but the capacity, intelligence, and experience of the servant, the character of the defects, his opportunity for detecting them, his situation and the circumstances calculated to withdraw his attention from them, as well as the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise, are factors of varying importance, which must also be taken into account."

On pages 69 and 70 it is said:

"While in a number of cases, in dealing with the particular facts involved, it has been held that the tool then being used (such as a stick with which to push cars, an ordinary hammer, or the like) was so simple in its character that the servant had at least equal opportunity with the master for observing it, and that he was at fault for not doing so, or that the master could not be charged with negligence as a matter of law for not inspecting it, and that, therefore, in such cases there could be no recovery, no arbitrary and invariable rule can be laid down by which it can be declared that a master is relieved from the duty of inspecting certain specified tools, regardless of the circumstances of the case. Nor can a court well undertake to make a catalogue of tools by name, and say that as to injuries caused by them there shall be an arbitrary exemption from liability on the part of the master. At last the duty of the master must necessarily to some extent depend, not merely upon the name of the tool, but also the circumstances under which it is furnished or kept for use and

under which it is used. The underlying principle, rather than the name of the tool, is the important matter."

In *Jones vs. Pacific Mills*, 57 N. E. 663, one side of a ladder was spliced, and in use broke. The evidence was conflicting as to the effect of the splice upon the strength of the ladder, some witnesses contending that the side was not more than fifty per cent as strong as it would have been if it had never been broken, while others testified that it was as strong as ever. It was held: that the peril was not obvious to plaintiff and therefore it could not be said that he was negligent as a matter of law in using it. The same considerations would apply to a defense of assumption of risk. In the discussion the court said:

"We think, that, upon the evidence, the questions whether the accident was attributable to the use of the ladder as it was intended to be used, whether the plaintiff knew and appreciated the risk arising from the manner in which this ladder had been spliced, were questions of fact for the jury."

In *Flanigan vs. Guggenheim Smelting Co.*, 44 Atl. 762, the servant was injured by the giving way of a ladder made in the company's carpenter shop and furnished the servant for use. There was evidence that a cross-piece broke near its left end where a nail was driven through it in the side piece near a knot in the cross-piece. It was held: that the sufficiency of the ladder, whether there was a structural defect in it which was ascertainable

by inspection, whether it was negligence for the servant to use it, whether he was negligent in stepping upon that particular rung, whether the breaking of the laader was on of the ordinary risks of his employment, or, *was an obvious risk*, and the like, were all questions of fact and as such were for the jury.

It being claimed that the negligent construction, if any, was that of the carpenter who was claimed to be a fellow servant, the court lays down the rule that the carpenter in furnishing the appliance for the use of the plaintiff was doing the duty of the master and represented him therein.

In the case of *Flood vs. Western Union Telegraph Company*, 15 N. Y. Supp. 400, the servant had occasion to do some work upon the outer end of an arm of a telegraph pole between which and the pole a hole had been bored in the arm to admit a certain peg to hold a glass insulator. The arm broke where the hole was bored and there was evidence that it was cross-grained and brittle—"dozy." The servant rested some weight on the arm beyond where the hole was bored. It was argued that the servant was in as good position as the master to know the condition of the arm. It was held: that the servant was not there to inspect, but to work, and that he was not bound to make inspection; and that it was a question for the jury whether or not the danger was obvious.

In *Standard Oil Company vs. Bowker*, 40 N. E.

128, the servant was injured through the giving way of a rung of a ladder. There was evidence that the nails were too small and were driven with the grain of the wood. It was held that as the Company made the ladder it had notice of its defective condition. The case is important as showing that recovery may be had for an accident happening through the insufficiency of the ladder where the danger is not necessarily obvious to the servant.

In *Ritt vs. True Tag Paint Company,* 69 S. W. 324, the servant complained to his superintendent about the condition of several ladders including the one which broke. The Superintendent said the ladders were all right. A few days later the servant used this particular ladder and it broke, injuring him. The ladder had in the meantime been repaired by a fellow servant and looked all right. It was held that the servant was entitled to damage and that he was not guilty of contributory negligence. The value of this case lies in the fact that it in effect holds that the servant may rely upon the appearance of the ladder, and if it is not obviously defective he may use it without being guilty of contributory negligence.

From *Twombly vs. Consolidated Electric Light Company,* 64 L. R. A. 551, we quote.

"The plaintiff was employed upon a ladder about 25 feet from the ground, and, in reaching for a rope with one hand, nearly his whole weight was suspended from a round in the ladder which

he held with the other hand. The round broke, and he fell to the ground, sustaining injuries. * * *

"The ladder in question was a 40-foot extension ladder and was extended at the time of the accident to the plaintiff. There was evidence that an examination of the round after the accident showed it to be "dozy" on the outside, and rotten. The ladder had been in use somewhat more than three years. It seems that the defendant company had no regular rules governing the inspection of appliances. * * * And we think it was fairly open to the jury to find that the defective condition of the round might have been discovered had it been suitably inspected; not, perhaps, by such an inspection as would naturally be given to it by the workman upon it, whose duty it was to work, not to inspect, and who might lawfully rely upon the presumption that the master had performed its duty, but by such an inspection on the part of the master as reasonably would be necessary to make sure that an appliance upon which the servant was to risk his life or limb every time he used it was reasonably safe.

The plaintiff testified that the round looked all right as he worked upon the ladder. But even that fact does not show that it was all right, or that the unsafe condition might not have been discovered by suitable inspection, such as was incumbent upon the master, unless in some way relieved from the duty.

But it is contended, as a matter of law, that the defendant is not liable upon the evidence. It is urged that there is no duty resting on the master to inspect, during their use, those common tools and appliances with which everyone is conversant; that, if they wear out and become defective, the employer may rely upon the presumption that those using them will first detect the defect;

and that the employer is not to be held for negligence when the tool is a common one, of the fitness of which the servant is as competent to judge as the master. And the defendant cites authorities in support of these propositions. But it seems to us that a 40-foot extension ladder is not a common tool or appliance within the meaning of these rules. A defect in a ladder, arising from age or decay, might not be discoverable by such inspection as a workman is expected to make, and might be upon more careful inspection. To replace a "dozy" round of a ladder is not, we think such "ordinary repairs" as a workman using it is usually expected to make, and certainly not unless the defect is brought to the knowledge of the servant. Of course, a master may furnish suitable materials for such renovations, and the circumstances in a given case may show that the workman is expected to make his own repairs. And in such case the master is not responsible for the neglect of the workman. But that is not this case. This plaintiff was under no special duty to inspect or repair this ladder, except as rainy-day work in common with his fellow laborers, when he might be directed specially to do so."

From the foregoing authorities the following rules may be deduced: That the master is bound to inspect and the servant is not. That the servant assumes an obvious risk but not one which is not apparent without inspection. That if the risk can be discovered by reasonable inspection, and cannot be seen without such inspection, then the risk is that of the master, whose duty it is to inspect, and is not assumed by the servant.

Applying the facts in this case to the rules thus announced Starr is entitled to recover. All of the

witnesses, including the foreman, agree, that the fact that this rung was cross-grained was not observed by them, and would not be observed by ordinary use of the instrumentality. They likewise agree that it would be apparent upon close inspection. That such defect would not suggest itself to the servant, and put him upon his guard, follows from the fact, testified to by nearly every witness, that a cross-grained rung is very rare. They testified likewise that the use of such a rung is dangerous, and Starr says that if he had known that the rung was cross-grained he would not have used it. Every element, therefore, necessary to uphold the recovery in this case, appears from the uncontradicted evidence in the record.

III.

The third proposition laid down in the brief of the Plaintiff in Error is worded as follows:

"The plaintiff below assumed the risk of the frailty of the ladder and was guilty of contributory negligence in using it as he did."

This point is based upon the appearance of the ladder itself. The witnesses, with the exception of Starr and the Doctors, were summoned into court by the company, and most of them were in the company's employ. They were experienced men in the use of ladders. None of them, except Filer, detected any frailty in the ladder. He did not communicate his fears of it to any of his coservants. The foreman, who is a most intelligent man, and

was still in the employ of the Plaintiff in Error, undoubtedly regarded the ladder as sufficient, or he would not have directed its use. Starr testified that the ladder looked all right. McMellon, testified that at the time of the accident he was waiting to use the same ladder. All seem to regard the ladder as being sufficient and it would have been sufficient if the rung which broke had not been cross-grained. The other rungs of the Filer ladder are of the same size as the rung which broke. They are fastened on to the sides in the same manner; none of them gave way, and it is fair to presume that the rung which broke would not have given way if it had not been cross-grained. To be sure it does not appear how much use was given the other rungs of the ladder, just as it does not appear that Starr got upon the cross-grained rung a single time before the time when he was injured. It was apparent, however, that the other rungs must have been used by Starr or he could not have reached the one which broke.

Against the evidence of these experienced men, against the findings of the jury and of the lower court, against the evident fact that the rungs which were not cross-grained were sufficient to bear and did bear Starr's weight, though they are as small and as frail in other respects as the one which broke, we are asked to say, on the authority of a lawyer's observation and opinion, and the court is asked to conclude on its own observation, that the rung which broke would have broken even if its

grain had been straight. It is not safe for us to formulate opinions after the event. When a rung has broken it is easy to say that it was small and weak, for the very happening of the accident tends to create that impression on the mind. We consider it unsafe, however, to attempt to balance our unskilled opinions, or that of any other professional man, against the actions, opinions, and testimony of men skilled in the use of such instrumentalities. The test of reasonable care on the part of a servant for his own safety, is that of the care of a man of ordinary prudence in like circumstances. Here, the action of Starr in using the ladder conformed to that of his fellow servants and that of his foreman. When it is shown that the foreman ordered the use of the instrumentality, and that Starr and his fellow servants undertook to use it without question, it is proven that men of ordinary prudence—for such they are presumed to be—would use the instrumentality, and, as we have said, that use was justified by the security of the other rungs which were not cross-grained when subjected to the same strain.

Under this head, attention is again called by Plaintiff in Error to the fact that there were five short pieces of ladder at this place. We have already shown in our statement of the case, that two of these pieces so referred to were component parts of the company's extension ladder, one a very small affair which Filer was using, and there were but two pieces available to be spliced to make

up the longer ladder, and these were the two which Smith directed to be used and which were used for that purpose.

IV.

The fourth proposition presented by Plaintiff in Error is thus stated in its brief:

"The plaintiff below failed completely to prove his cause of action."

It is claimed that we failed to prove our allegation, "that certain ladders had been furnished for said gang of men by the defendant for their use, and plaintiff had nothing to do with the furnishing of said ladders."

It is stated that the proof showed the contrary, and that plaintiff and his fellow servants furnished their own ladders, and that plaintiff actually builded the very ladder upon which he was injured.

We have so frequently, in this brief, adverted to the facts on this point, that it is necessary for us to say no more than this, that we take issue absolutely with counsel upon that statement. We contend that the record shows, beyond question, that the defendant undertook to furnish ladders, and that when the men, because of the failure of the company to perform its full duty, procured two short ladders for other work, the defendant, through its foreman, who had charge of the furnishing of ladders to the men, adopted these pieces of ladder as the material for the construction of

the ladder which broke, and directed that a ladder be constructed by the splicing of these two ladders together. Plaintiff did not build the ladder. He simply assisted in making the splice; and that part of the work was well done. Neither the plaintiff nor his fellow servants would have used a spliced ladder, as is shown by their request to the foreman to procure them a long ladder, if it had not been for the express command of their foreman.

It is said, also, by way of argument, that this point goes to the very essence of the case. On the contrary, if it cannot be said in law that this particular ladder, under the circumstances, was furnished by the defendant, yet its use was directed by the defendant, and the legal consequences are the same. Now there is not even a variance between an allegation that the defendant furnished the ladder, and that the defendant directed the use of a ladder owned or furnished by some one else, for the essential element in each case is, that this is the provision made by the master in the performance of his duty to furnish instrumentalities for the work. As we say, it would not even be a variance, far less a failure of proof.

Let us assume, however, that the two circumstances are essentially and legally different. Then the question arises what effect it will have upon our right of recovery.

It is not necessary for us to cite authority upon the proposition that in actions of law the Federal

courts of a state conform to the practice of the state courts in all matters of procedure. The question presented under this subdivision therefore is determinable by the decisions of the supreme court of the State of Washington.

But one authority from this state is cited in the brief, namely: the case of *Albin vs. Seattle Electric Company,* 40 Wash. 51. The court will observe, on reading that case, that there was no relation between the allegations and the proof. The negligence alleged did not belong to the same class as the negligence proven; and finally, and most important, the evidence was introduced over the objection of the defendant.

In this case the evidence of the manner in which the ladder was furnished, and the circumstances under which it was used, was introduced without objection. In point of fact we think there were but two objections made during the course of the trial, one of which was made by the company and appears on page 27 of the record, and was sustained, and one of which was made by the plaintiff and overruled by the court, and which appears on page 94 of the record, neither of which has any bearing upon the case. All the facts upon which plaintiff recovered judgment were admitted without objection of any kind.

In such case, it is held in *Sherman vs. Sweeney,* 29 Wash. 321, 331, that evidence so introduced without objection becomes the property of the case,

and that the court and jury must give effect to it as if it were pleaded, the pleading being considered amended for that purpose.

Also in *Carlisle Packing Company vs. Deming*, 62 Wash. 455, where a certain essential fact had not been pleaded, but proof of it was admitted without objection, the court, upon motion for a non-suit, treated the pleading as being amended to conform to the proof.

CONCLUSION.

The evidence in this case was given almost wholly by witnesses summoned by the company but introduced by Starr. The witnesses, for the most part, are employees of the company, and certainly were not partisans of the other side. Their evidence was so frank and fair that they were cross-examined very briefly. Their stories are absolutely consistent, not only with each other but with the physical evidence introduced. The Defendant in Error was badly injured, as is evidenced by the fact that it is not complained that this large verdict is in any respect excessive. No complaint is made of the instructions of the court. The case, therefore, having been submitted fairly to the jury upon truthful testimony, we submit that the verdict of the jury ought not to be disturbed.

Respectfully sibmitted,

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY (a corporation), *Plaintiff in Error,* vs. FRANK STARR, *Defendant in Error.*	No. 2242

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The defendant in error has presented for the consideration of the court some propositions which may not have been sufficiently anticipated in our initial brief. We therefore deem it proper to present the following in answer thereto: It may be fairly said that counsel has not neglected to present his case with ingenuity and some plausibility. It will be observed that he makes his case depend upon the single thread that Smith (called the foreman) directed the plaintiff below to use a piece of ladder which proved to be defective, and that the master for whom Smith was working is therefore liable.

The vice of the argument is to be found in this: Conceding it to be a fact that Smith specifically directed the ladder to be made of these particular two pieces, out of the five or six which were upon the ground (a fact which is by no means made clear by the evidence), he was not, in so doing, acting for the master, because he was not performing a function which the master had undertaken to perform. He was, therefore, not a vice-principal, but a fellow servant for whose act the master is not liable.

It is the accepted rule, in the Federal courts at least, that the question of vice-principal, or fellow servant, is determined by the function performed and not by the name by which an employee is designated, or the extent of his authority or control. As is said in *B. & O. Railroad Co. v. Baugh,* 149 U. S. 368, 387:

> "Therefore it will be seen that the question turns rather on the character of the act than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

See, also, exhaustive list of cases cited in *American Bridge Co. v. Seeds,* 144 Fed. 605.

If the defendant company had undertaken to furnish ladders this would have been a function that could not have been delegated and had the company commissioned Smith or any other employee to perform it, that em-

ployee, regardless of the name by which he was called, would have been a vice-principal.

The undisputed testimony in this case, however, was that the contract of employment (a contract made of a custom to which Starr himself had assented for four years) contemplated that not the company, but the employees themselves, should furnish their own ladders when sufficient of the company's ladders were not at hand. This was an instance where sufficient of the company's ladders were not at hand and the ladders in question were those furnished by the employees, as Starr himself well knew. He testifies:

> "Q. If there were six men working, how many ladders would they need if their work was twenty feet above the surface of the ground?
> A. They would need at least three.
> Q. How many ladders did the company furnish directly at that time and place?
> A. One.
> Q. You have heard the testimony concerning the use of two ladders, one of which may be designated as the Filer ladder and the other as the McCartney ladder?
> A. Yes, sir.
> Q. Do you remember those ladders were on the job?
> A. Yes, sir" (record, page 84).

And again on cross-examination he says:

> "Q. In other words, the company did not furnish either one of those pieces.
> A. No.
> Q. Filer and McCartney, who were working in the same capacity you were, were they——
> A. Yes, sir.
> Q. Either of them got them somewhere?
> A. Yes, sir.

Q. The day before. And the lower portion was probably gotten two days before?

A. Yes, sir.

Q. The upper portion the day before, the same day you spliced together, the upper portion?

A. I don't remember exactly whether it was got the day before or not but it was got a day or two, something like that'' (record, page 95).

Indeed it is not disputed that all the six men upon the work, including Starr, knew perfectly that the ladders in question were those which had been secured under the rule that the employees should ''rustle'' their own ladders.

It should not, we take it, be doubted that in the absence of statutory prohibition, the master and servant may contract that the servant furnish or inspect his own appliances, in which event the servant assumes the risk of any defect in an appliance thus selected or undertaken to be selected by himself or his co-workers. The rule is stated in *26 Cyc.,* 1329:

> ''Where a servant is authorized or required by the employment to himself furnish his own appliances for the work, the master is not liable where a fellow servant is injured because of defects therein.''

It was said by Judge Lurton in *Brittain v. Central Union Telephone Company,* 131 Federal 844, at page 845, in a case where damages were claimed because of a defective telephone pole:

> ''The practice and custom under which it conducted its operations made every lineman his own inspector and linemen were required to make such inspection and testing of poles before going on

> them as they should deem essential to their own safety, in doing the work they assumed to do * * * but we see no reason why a lineman in view of the peculiar character of his work, may not lawfully contract to do any inspecting or testing reasonably necessary to determine whether he can safely climb a particular pole for the purpose of adjusting, transposing, or placing new wires. His acceptance of service with knowledge of the way in which the company conducts this part of its business, whether that way be the safest for him or not, would imply an assumption of the risks incident to that mode of carrying on its work."

It therefore follows, that even if we go so far as to concede that Smith selected the ladder which Starr was using, he was in that regard performing no function of the master because the master had not undertaken to perform such function.

The most that can be claimed is that Smith was negligent in directing Starr to splice and go up on a ladder without inspecting it so as to ascertain its strength. If Smith was negligent in this respect, it would still be the negligence of a fellow servant and the master is not liable any more than it would be for any other act or omission of Smith in the direction of details of the work.

WHAT INSPECTION OR TEST WOULD SMITH BE REQUIRED TO MAKE.

No rule is better settled than that the master is not an insurer of the safety of the servant. He has discharged his duty to a servant when he has made and continued, as prudence requires, a *reasonable* inspection

or test. Unquestionably the rule is as stated by Thompson (*4 Thompson on Negligence,* section 3947):

> "The master is under an affirmative duty to his servant to make a reasonable, diligent and skillful inspection and to resort to reasonable tests to see that any scaffolds, ladders etc., on which he requires his servant to work shall bear the weight to which he subjects it."

Or as stated by the Supreme Court in *B. & O. Railroad v. Baugh,* 149 U. S. at page 386:

> "That positive duty (the duty to provide the place, tools and machinery) does not go the extent of a guarantee of safety but it does require that reasonable precautions be taken to secure safety."

Now what is *reasonable* inspection or what the nature or extent of the test required is manifestly to be measured by the character of the appliance or the use to which it is to be subjected. If the master places in his servant's hands an appliance complicated in its structure, or one about which latent or concealed defects may exist, a particular, intimate scrutiny and test is required; but in the case of a simple appliance where every part is apparent and where any deficiency is ordinarily readily observable to the glance or the touch, we submit a more superficial examination is all that reasonableness requires. Surely in the case of a ladder, the duty to make a "reasonable inspection" would not require that Smith do more than scrutinize the materials out of which it was made; to observe if they were of sufficient size and as far as the eye could tell, of sufficient apparent strength; to observe if it

had become warped, or if the nails which held its parts together had become loosened. Surely he would not be required to make a minute examination of the grain of the wood, or to submit each particular component part to a weight test in order to determine its exact tensile strength. If this be true Smith, even if he had been representing the master, in the exercise of reasonable precaution, could not have been required to make a closer or more intimate observation or test than the very one which Starr himself must necessarily have made when he had the ladder before him and was handling it while he and McCartney spliced it.

It follows, therefore, that even had the duty of reasonable inspection rested upon Smith, and even if he could be said to have been the representative of the master in the performance of a function which it was the master's duty to perform, and he were guilty of negligence in not discovering the defect, Starr was equally guilty in not discovering it for himself.

An analysis of all the cases cited by the defendant in error will demonstrate that they differ in principle from the case at bar in at least three essentials, namely: First, they are cases where the master has assumed the duty of furnishing the appliances; Second, the servant had no such opportunity of inspection as was afforded Starr in the present case; Third, the defect complained of was much more obscure than in the present case.

Counsel's diligence has enabled him to find and cite the two or three cases where state courts have refused to class ladder cases under the "common tools" doc-

trine, but we confidently assert that if the court is disposed to be controlled by the great weight of authority it cannot adopt the doctrine for which counsel contends, as an examination of the authorities cited upon pages 15 et seq. of our initial brief will demonstrate.

It cannot escape the observation of the court that counsel for the defendant in error has audaciously attempted to leap the insurmountable barrier which consists of the fact that the appliance which caused the injury was not furnished by the master nor by any one delegated by the master to perform such function. If the fact is borne in mind that the appliance was selected by the defendant in error and his fellow servants under a rule or custom in which both parties to this action had assented, the conclusion cannot be escaped that any negligence which caused the accident was that of Starr and his co-employees and for which the master is not liable.

Respectfully submitted,

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